Supreme Court, U.S.
FILED
DEC 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

88-1050
No. 88-

In The
Supreme Court of the United States

October Term, 1988
No. 88-

KAREN APPLEGATE and PHIL APPLEGATE, individually, and as parents of the late COLLEEN APPLEGATE, aka "SHAUNA GRANT",

Petitioners,

vs.

People of the State of California, and HAROLD FREEMAN,

Respondents,

vs.

JOHN VAN DE KAMP, Attorney General of the State of California, IRA REINER, District Attorney of Los Angeles County, JAMES K. HAHN, City Attorney of the City of Los Angeles,

Real Parties In Interest.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

* COUNSEL OF RECORD

JAMES J. CLANCY *
9055 La Tuna Canyon Road
Sun Valley, California 91352
(818) 352-2069
Attorney for Petitioners

QUESTION PRESENTED

1. DOES THE CONDUCT OF HIRING AN ACTOR TO PERFORM SEX ACTS (SEXUAL INTERCOURSE, ORAL COPULATION AND SODOMY) IN MOTION PICTURE FILMS CONSTITUTE FREE SPEECH, WHICH IS PROTECTED BY THE FIRST AMENDMENT[1], WHICH MAY NOT BE REGULATED BY GOVERNMENT EXCEPT WHERE THE FILM ITSELF IS ALSO PROVEN TO BE OBSCENE UNDER FEDERAL OBSCENITY STANDARDS?

[1]This "lewd conduct-free speech" federal question "tracks" the federal question which is presently before this court in Texas v. Johnson No. 88-155, see Texas v. Johnson, ___US___, 49 CCH Supreme Court Bulletin (October 17, 1988) at page 132, namely:

> "Does The Public Burning Of An American Flag During The Course Of A Political Demonstration Constitute Free Speech Subject To The Protection Of The First Amendment?"

SUBJECT INDEX

PAGE

QUESTION PRESENTED i

MOTION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA 2

OPINIONS BELOW 2

JURISDICTION 4

QUESTION PRESENTED 6

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 7

STATEMENT OF THE CASE 8

REASONS FOR GRANTING INTERVENTION AND THE WRIT OF CERTIORARI 37

1. THE FIXLER CRIMINAL REMEDY IS CRUCIAL TO OBSCENITY LAW ENFORCEMENT. FIXLER MUST BE REHABILITATED AS A LAW ENFORCEMENT WEAPON 37

2. CALIFORNIA PENAL CODE SECTION 266(i) IS CONSTITUTIONAL ON ITS FACE 41

3. CALIFORNIA PENAL CODE SECTION 266(i) IS CONSTITUTIONAL AS APPLIED TO THE PRODUCTION OF THE FILM "CAUGHT FROM BEHIND II" 43

4. RULE 17.1(b) OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN 44

5. RULE 17.1(b) OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN 45

6. RULE 17.1(a) OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN 46

7. THE EQUITY PRINCIPLES UNDERLYING THE PRIVATE ATTORNEY GENERAL CONCEPT AT THE TRIAL LEVEL SUPPORT THE FILING AND GRANTING OF THIS PETITION FOR WRIT OF CERTIORARI HEREIN AT THE APPELLATE LEVEL 47

8. RULE 20.4 OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE FILING AND GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN 48

CONCLUSION 52

CERTIFICATE OF SERVICE 55

CASES

A Motion Picture Film Entitled "Vixen" et al. v. State of Ohio ex. rel. Charles H. Keating, Jr., October Term, 1972, No. 71-599, 27 Ohio St.2d 278 (July 31, 1971), vacated and remanded in 413 U.S. 905, 37 L.Ed.2d 1016 (June 25, 1973), adhered to upon remand in 35 Ohio St.2d 215, 301 N.E.2d 315, 301 N.E. 2d 880 (Sept. 26, 1973) 13, 20 21, 22, 23 24, 45, 51

County of Inyo v. City of Los Angeles 78 Cal.App.3d 82 at 89, fn1, 144 Cal. Rptr. 71, at 75 footnote 1 47

Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 214 ....6, 36 49

Evans Theater Corp. et al. (I Am Curious (Yellow), October Term, 1971 No. 71-89, 227 Ga. 377, 180 S.E.2d 712 (Mar. 4, 1971), Petition for Writ of Ceriotrari to the Supreme Court of Georgia denied in 404 U.S. 950, 30 L. Ed.2d 267, 92 SCt. 281 (Nov. 9, 1971) 13, 16, 17 18, 19, 45 51

Frisby v. Schultz 487 U.S. ___ 101 L.Ed.2d 420, at 430, 108 Sct. ___June 27, 1988 42

Fort Wayne Books, Inc. v. Indiana Oct. Term 1987, No. 87-470 .....21, 32

Freedman v. Maryland 380 U.S. 51, 13 L.Ed.2d 649, 85 SCt. 734 (Mar. 1, 1985) 16, 20

Hunter v. Ohio ex. rel. Miller 396 U.S. 879 (1969) 6, 37

Jacobellis v. Ohio, 378 U.S. 184 (1964) 8, 9, 10, 11, 14, 17 20, 31

Newman v. Piggie Park Enterprises 390 U.S. 400 at 401 .....47, 48

Paris Adult Theatre I v. Slaton 413 U.S. 49 at 54-55 (June 21, 1973) 19, 46

People ex. rel. Busch v. Projection Room Theater 17 Cal.3d 42, at 54-55 130 Cal.Rptr. 328 at 335 (June 1, 1976) 19, 20

People of the State of California ex. rel. Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523 at 529 .....39, 40

People v. Fixler (1976) 56 Cal. App.3d 321 .....30, 31, 37 38, 41

People of the State of California v. Harold Freeman 233 Cal.Rptr. 510 (Jan. 6, 1987) 2, 25 26, 27, 41

People of the State of California v. Harold Freeman 46 Cal. 3d 419, 250 Cal. Rptr. 598 (Aug 25, 1988) .2, 12, 20 21, 23, 24, 37 39, 40, 41, 43 50, 52

State of Minnesota v. Robert Walter Bonynce, Fourth Judicial District Court, Division Four, Edina, County of Hennepin 39, 40

Texas v. Johnson No. 88-155, Texas v. Johnson, ___US___, 49 CCH Supreme Court Bulletin (October 17, 1988) at page 132 ..... 7, 47, 52

Trans Lux Dist. Corp. v. The Board of Regents of the University of the State of New York (A Stranger Knocks) October Term, 1963, No. 314, 14 N.Y.2d 88, 248 N.Y.S.2d 857, 198 N.E.2d 242 (Mar. 26, 1964), reversed on other grounds in 380 U.S. 259, 13 L.E.2d 959, 85 S.Ct. 952 (Mar. 15, 1965) 12, 14, 15 16, 18, 19, 23 24, 30, 34, 35 41, 43, 51

United States v. Roeder 526 F.2d 736 31, 40

U.S. v. Sandys et al. 605 F2d 210 (CA6th 1979) Cert. denied in Gordon v. U.S. and Friedlander v. U.S. 444 U.S. 984 (Dec. 3, 1984) 51, 52

U.S. v. 12-200 ft. Reels of Super 8mm Film 413 U.S. 123, 37 L.Ed.2d 500 (1973) 23

U.S. v. 37 Photographs 402 U.S. 363 at 377, 28L.Ed.2d 822, 834 (1971) 52

STATUTES, ORDINANCES, RULES

California Codes

California Penal Code
Section 266(i) 25, 41, 43

United States Code

19 USC Section 1305(a) 52
28 USC Section 1254(i) 6, 7
28 USC Section 1257(3) 6, 8, 49

TEXTS, MISCELLANEOUS

Stern, Gressman and Shapiro, Supreme Court Practice (Sixth Edition)

Pages 44-47 37
Page 47, footnote 1 ..... 6, 48
Pages 338-342 .....36, 37

6 Witkin, California Procedure (Third Edition), p. 329 .....6, 36, 49

In The
Supreme Court of the United States

October Term, 1988
No. 88-

KAREN APPLEGATE and PHIL APPLEGATE, individually, and as parents of the late COLLEEN APPLEGATE, aka "SHAUNA GRANT",

Petitioners,

vs.

People of the State of California, and HAROLD FREEMAN,

Respondents,

vs.

JOHN VAN DE KAMP, Attorney General of the State of California, IRA REINER, District Attorney of Los Angeles County, JAMES K. HAHN, City Attorney of the City of Los Angeles,

Real Parties In Interest,

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Karen Applegate and Phil Applegate, individually and as parents of the late Colleen Applegate, also known as "Shauna Grant," pray for leave to intervene and further pray that a Writ of Certiorari be granted to review the judgment of the Supreme Court of California entered in People of the State of California V. Harold Freeman on August 25, 1988.

OPINIONS BELOW

The opinion of the Supreme Court of California in People of the State of California V. Harold Freeman is printed at Appendix A hereto, and is reported at 46 Cal.3d 419, 250 Cal.Rptr. 598 (Aug. 25, 1988). The opinion of the Court of Appeal, Second District, Division 4 (Kingsley, Acting Presiding Justice, Arguelles, McClosky), in People of the State of California V. Harold Freeman is printed at Appendix B hereto, and is reported at

233 Cal.Rptr. 510 (Jan. 6, 1987). The opinion of the Court of Appeal, Second District, Division 4 (Kingsley, Acting Presiding Justice, Arguelles, McClosky), in People of the State of California V. Harold Freeman is printed at Appendix C hereto, and is reported at 234 Cal.Rptr. 245 (Feb. 2, 1987).

Petitioners Karen Applegate and Phil Applegates' "Motion for leave to file brief amicus curiae in support of petition for rehearing by respondent pursuant to Rule 27 (b); or in support of a hearing granted on the Court's own motion before the decision becomes final pursuant to Rule 27 (a); with brief amicus curiae annexed," which was received by the Clerk on Sept. 9, 1988 and filed by the Court on Sept. 14, 1988, is printed at Appendix D hereto. The order of the California Supreme Court filed Oct. 20, 1988, denying petitioners'

motion, is printed at Appendix E hereto. The remittitur of the California Supreme Court, filed October 21, 1988, is printed as Appendix F hereto.

JURISDICTION

The judgment of the Supreme Court of California was entered on August 25, 1988. On September 9, 1988, Petitioners served on the parties and lodged with the Clerk of the California Supreme Court their timely "Motion for leave to file brief amicus curiae in support of petition for rehearing by respondent, pursuant to Rule 27 (b); or in support of a hearing granted on the Court's own motion before the decision becomes final, pursuant to Rule 27 (a)." On Wednesday, September 14, 1988, the California Supreme Court filed the same and extended its jurisdiction to act on said motion to October 24, 1988. On October 20, 1988, the Court entered an order denying petition-

ers' motion. See order at Appendix E hereto.

Pursuant to such action, the judgment which was entered on August 24, 1988 did not become final on September 24, 1988, but was stayed for an additional 26 days until October 20, 1988, when the Court entered its order denying petitioners' motion. Because an appeal may only be taken from a final judgment, the statutory period of 60 days must be deemed to have been tolled during that period. Accordingly, the time for filing the petition for Writ of Certiorari, under Rule 20.4 of the United States Supreme Court Rules, runs from the date of the denial of the Motion for Rehearing on October 20, 1988. Further, the action of the California Supreme Court on Sept. 14, 1988 extending its jurisdiction, and on October 20, 1988 denying petitioners' motion, logically must be viewed as an order allowing moving

party (petitioners) to intervene as a "party." Only a party to the proceeding can make a motion therein. Difani V. Riverside County Oil Co. (1927) 201 Cal. 210, 214, 6 Witkin, California Procedure (Third Edition) at page 329. See, also, Hunter V. Ohio ex rel. Miller 396 US 879 (1969), in which this Court allowed a non party in state court proceedings to intervene, which petition was thereafter denied. See Stern, Gressman and Shapiro, Supreme Court Practice (Sixth Edition) at page 47. At footnote 14, the authors point out that in state cases, 28 USC Sect. 1257 (3) does not require that the petitioner be a party below; whereas in federal cases, 28 USC Section 1254 (1) does. Jurisdiction also exists under the private attorney general concept.

QUESTION PRESENTED

Does the conduct of hiring an actor to perform sex acts (sexual intercourse,

oral copulation and sodomy) in motion picture films constitute free speech, which is protected by the First Amendment[1], which may not be regulated by government except where the film itself is also proven to be obscene under federal obscenity standards?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Constitution, Article IV Section 1; First, Ninth, Tenth, Fourteenth, Rule 17.1(a), 17.1(b), and 20.4 of U.S. Supreme Court Rules; 28 USC Section 1254 (1)

---

[1]This "lewd conduct-free speech" federal question "tracks" the federal question which is presently before this court in Texas v. Johnson No. 88-155, see Texas v Johnson, U.S. , 49 CCH Supreme Court Bulletin (October 17, 1988) at page 132, namely:

> "Does The Public Burning Of An American Flag During The Course Of A Political Demonstration Constitute Free Speech Subject To The Protection Of The First Amendment?"

and 1257 (3); California Penal Code Section 266 (i); California Rules of Court, Rule 24(a); 25(a), 27(a), 27(b). See Appendix K.

STATEMENT OF THE CASE

In the 24 years since this Court's decision in Jacobellis V. Ohio 378 U.S. 184, numerous efforts have been made by law enforcement to resolve the "obscene conduct-free speech" federal question left unanswered by Jacobellis; that is: "Independent of the governmental power to regulate obscene subject matter and obscene performances as a whole under the obscenity statutes, what, if anything, can be done to regulate 'conduct' which, if performed alive in three dimension, would be proscribable as a classic example of 'lewd conduct in public,' when such 'conduct' is performed by actors and recorded by still photography and on motion picture film, for commercial sale and exhibition in two dimension form

to the public?" Those efforts were made in both the civil and criminal context. In each case, this Court has avoided a resolution of this federal question on the merits. That "avoidance" has resulted in the Freeman errors.

In Jacobellis V. Ohio, 378 U.S. 184 (1964), this Court considered the "obscene conduct-free speech" federal question in a peripheral context. There, the Ohio Supreme Court considered the French film, "The Lovers," described by Justice Brennan at 378 U.S. 196 as involving "a woman bored with her life and marriage who abandons her husband and family for a young archaeologist with whom she has suddenly fallen in love. There is an explicit love scene in the last reel of the film, and the State's objections are based almost entirely upon that scene..." Justice Goldberg described the film at 378 U.S. 197 as, "I have viewed the film

and I wish merely to add to my Brother Brennan's description that the love scene deemed objectionable is so fragmentary and fleeting that only a censor's alert would make an audience conscious that something 'questionable' is being portrayed." Except for the brief scene of sexual intercourse, the film, "The Lovers" was innocuous and could have been shown on T.V. to a children's audience without cause for complaint. The Ohio Supreme Court attacked the underlying problem, insofar as it affected the State of Ohio public morals, by affirming the trial court's finding that the film as a whole was obscene, and that Jacobellis had violated the State obscenity statute. Upon appeal, this Court rejected the criminal solution posed by the Ohio Supreme Court and, in a no-clear-majority decision in which five separate opinions were filed, held

that the state criminal conviction violated the First and Fourteenth Amendments to the Federal Constitution.

The Jacobellis ruling had the effect of opening "Pandora's Box." In the 24 years that have followed Jacobellis, this Court has resisted every effort of law enforcement to clarify the extent of the civil and criminal powers of state and federal government in the "lewd conduct-free speech" debate and, thus, to close "Pandora's Box." Unfortunately, this Court's silence in major cases and reluctance to provide guidance in this public morals area has resulted in an assumption that, in the interest of free speech, this Court in this context has given "sub silentio" approval to the underlying "obscene conduct" engaged in by Harold Freeman and the "World Modeling Agency" (Jim Smith), which is so dramatically made "express" in the erroneous

legal analysis of Justice Kaufman in People of the State of California V. Harold Freeman 46 Cal.3d 419, 250 Cal. Rptr. 598 (Aug. 25, 1988).

In the 24 years that followed, at least three major efforts were made in three state jurisdictions to get this Court to undertake a review of the law enforcement powers of states within the federal question herein framed. In each case, a federal question was placed upon the docket of this Court which sought a review of state procedures and remedies which excluded the need for determining whether the film itself was obscene. Trans Lux Dist. Corp. v. The Board of Regents of the University of the State of New York (A Stranger Knocks) October Term, 1963, No. 314, 14 N.Y.2d 88, 248 N.Y.S.2d 857, 198 N.E.2d242 (Mar. 26, 1964), reversed on other grounds in 380 U.S. 259, 13 L.E.2d 959, 85 S.CT. 952

(Mar. 15, 1965); Evans Theater Corp. et al [I Am Curious (Yellow)], October Term, 1971 No. 71-89, 227 Ga.377, 180 S.E.2d 712 (Mar. 4, 1971), Petition for Writ of Certiorari to the Supreme Court of Georgia denied in 404 U.S. 950, 30 L.Ed2d267, 92 SCt. 281 (Nov. 9, 1971); A Motion Picture Film Entitled "Vixen" et al. v. State of Ohio ex. rel. Charles H. Keating, Jr., October Term, 1972, No. 71-599, 27 Ohio St.2d 278 (July 31, 1971), vacated and remanded in 413 U.S. 905, 37 L.Ed.2d 1016 (June 25, 1973), adhered to upon remand in 35 Ohio St.2d 215, 301 N.E.2d 315, 301 N.E.2d 880 (Sept. 26, 1973). In each case, this Court refused to exercise its discretion and grant a review of the "lewd conduct-free speech" federal question raised therein.

In the Trans Lux Case, supra, the film, "A Stranger Knocks", an innocuous film except for the inclusion of two scenes

of sexual intercourse had been imported to the State of New York from Sweden and lawfully passed through the U.S. Customs. The New York State Board of Review, however, refused to license the film for exhibition in the State of New York unless two scenes, involving "conduct", portraying sexual intercourse, were removed. Thus, in Trans Lux, the same issue was raised in the State of New York as was raised in the Jacobellis case in Ohio, except the New York proceedings were civil rather than criminal.

Upon appeal, the Appellate Division of the Supreme Court in 244 N.Y.S.2d 333 annuled the State Board of Regents ruling and directed a license be issued on the ground that the film was not obscene and "the sexual acts, which are implied rather than demonstrated, are an integral part of the play." On further appeal, the

Board's determination, denying a license, was reinstated in a remarkable opinion by Associate Justice Burke, speaking for the New York Court of Appeals, which carefully analyzed the principles surrounding the "lewd conduct-free speech" federal question and held that the two scenes must be deleted because, under New York law, the film involved "obscene conduct" and not free speech." Thereafter, in the jurisdictional statement seeking review by the U.S. Supreme Court, the exhibitor framed two questions based upon free speech and prior restraint. In his third jurisdictional question, he framed the more important and basic question and argued that the film has passed through customs, that it had been determined that the film "A Stranger Knocks" was not obscene, and that the state licensing provision, as applied, was invalid because

of its conflict with Section 305 of the Tariff Act of 1930. See jurisdictional statement at page 5. Instead of noting jurisdiction and answering the third and fundamental substantive question, this Court avoided that issue, chose instead to review the procedural question raised in Freedman V. Maryland 380 US 51, 13LEd2d 649, 85 SCt.734 (Mar. 1, 1985), and thereafter reversed the Trans Lux judgment on the procedural issue decided in Freedman V. Maryland. See Trans-Lux Dist. Corp. V. Board of Regents of the University of New York 380 US 259, 13LEd2d 959, 85 SCt.952 (March 15, 1965).

In the Evans Theatre Corp. case, supra, the Fulton County Georgia District Attorney brought a civil action to injoin the exhibition of the film, "I Am Curious (Yellow)" as an obscene film and a public nuisance. The film, "I Am Curious (Yellow)", an import from Sweden, also was an innocuous

film, depicted two hours of political propaganda and also included several momentary displays of sexual intercourse of very brief duration. After an immediate hearing on a motion for a preliminary injunction and viewing of the film, the trial court issued a preliminary injunction, on the grounds that the film violated the Georgia obscenity statute. Thus, the Georgia Supreme Court ruling that the film violated the state obscenity statute was similar to the Ohio Supreme Court ruling that Jacobellis violated the state obscenity statute, except that, in the Georgia situation, the federal question was raised in a civil, rather than a criminal proceedings.

On appeal to the Georgia Supreme Court, the People cited and relied largely upon the principles expressed by Associate Justice Burke in his analysis in Trans Lux supra. In its opinion upholding the in-

junction against such exhibition, the Georgia Supreme Court did not cite Trans Lux but did, however, apply the Trans Lux principles. See Evans Theatre Corp. v. Lewis R. Slaton 180 SE2d 712 at 715 where the Court noted that there was little difference in the effect on the public between lewd conduct in public areas and lewd conduct in films shown to the public. When the Evans Theatre Corp case was brought to this Court in a petition for Writ of Certiorari, this Court once again exercised its discretion and refused to hear and decide the all important "lewd conduct-free speech" federal question which has been and is being exploited by the pornographic industry to its great advantage. Evan's Theatre Corp. et al. v. Slaton 404 U.S. 950, 30 LEd2d 267, 92 SCt.281 (Nov. 9, 1971). Although this Court declined to grant a hearing

on the remedy applied by the Georgia Supreme Court against one of the most controversial films brought before this Court ["I Am Curious (Yellow)"], it did see fit later to refer obliquely to that case, and cite with approval that procedure and result. See Paris Adult Theatre I V Slaton 413 US 49 at 54-55 (June 21, 1973). Ironically, the Evans Theatre case was also cited with approval by the California Supreme Court in its decision in People ex rel Busch V. Projection Room Theater 17 Cal.3d 42, at 54-55 130 Cal.Rptr.328 at 335 (June 1, 1976), in which the California Supreme Court impliedly adopted the above stated Trans Lux principles which were used by the Georgia Supreme Court to resolve the "lewd conduct-free speech" federal question in the Evans Theater Corp. case. The California Supreme Court's analysis

in the Projection Room Theater case is at odds with its analysis in People of the State of Calif. V. Harold Freeman

In Ohio Ex. Rel. Charles H. Keating, Jr. V. Vixen et al., supra, a private citizen, on September 22, 1969, brought a civil public nuisance abatement action to enjoin the exhibition of Russ Meyer's Film, "Vixen." "Vixen" was a transitional film in the unresolved 24 year "lewd conduct-free speech" controversy which began with this Court's decision in Jacobellis V. Ohio and strong State opposition to relatively innocuous films like "The Lovers," "A Stranger Knocks" and "I Am Curious (Yellow)" and presently allows neighborhood sales and exhibition of patently hard-core pornographic video tapes like "Caught From Behind II" in Freeman and the seven-day-a-week national broad-

cast and exhibition of patently hard-core films on Satellite T.V. with little state opposition in the California Supreme Court. Among the latter are re-runs of hard-core films showing Petitioners' deceased daughter Colleen Applegate, AKA Shauna Grant, in lewd conduct on the screen. As to this, see "Motion of Phil Applegate and Karen Applegate for leave to film brief amicus curiae" in Fort Wayne Books, Inc. v. Indiana Oct. Term 1987, No. 87-470 at Appendix A-1 through A-52 and B-1 through B-29. After a trial on the merits, the Hamilton County Common Pleas Court enjoined the exhibition of "Vixen" as an obscene film in violation of the Ohio State obscenity and public nuisance statutes.

On appeal, the Ohio Supreme Court, in direct conflict with the California Supreme Court in Freeman refused to

adjudicate the question whether "Vixen" was obscene as a whole and, instead, enjoined its exhibition on the ground that the exhibition of "lewd conduct" on the screen was a public nuisance which equity can and must enjoin.

When the "Vixen" case was appealed, this Court responded in the same fashion and, once again, refused to hear and resolve the critical "lewd conduct-free speech" federal question which has provided an "excuse" for the Harold Freeman and "World Modeling Agency" (James South) Enterprises. See A Motion Picture Film Entitled "Vixen" et al. v. State of Ohio Ex. Rel. Charles H. Keating, Jr. 413 U.S. 905, 37LEd2d 1016 (June 25, 1973), vacating and remanding Ohio Ex. Rel. Charles H. Keating, Jr. v. "Vixen" et al. 27 Ohio St2d 278 (July 31, 1971), adhered to upon demand in 35 Ohio ST2d 215, 301

NE2d 215 (Sept. 26, 1973). In a "Petition for Rehearing" filed on July, 1973, Appellee Ohio Ex. Rel. Charles H. Keating, Jr. again focused upon Associate Justice Burke's anaysis in the Trans Lux case and requested that the judgment of the Ohio Supreme Court be re-examined and affirmed on the merits in accordance with the principles expressed by this Court in U.S. v. 12-200 ft. Reels of Super 8 mm Film. See pages 3-9 of "Motion to Affirm" and 3-11 of "Petition for Rehearing", copies of which appear at Appendix G and H to this Petition. That Petition was denied in 414 U.S. 881, 38 L Ed 2d 128, 94 SCt. 27 (October 9, 1973).

The Ohio Supreme Court's analysis is still controlling law in the State of Ohio. Petitioners submit that the California Supreme Court's analysis of the federal issue in People of the State of California v. Harold Freeman;

namely, that a state's regulatory controls may not be exercised independently of the obscenity issue is at complete variance with the Ohio Supreme Court's analysis in the "Vixen" case and is grounds for granting this Petition. See Rule 17.1 (b) of Rules of the U.S. Supreme Court.

In the face of the law enforcement problems which arose as a result of this Court's unwillingness to address the federal question in the "lewd conduct-free speech controversy" and the principles expressed by New York Associate Justice Burke in the Trans Lux case, the judiciary in the State of California (where the majority of hard core pornographic films and subject matter is produced) responded to "prodding" at the insistence of the Los Angeles Administrative Vice which developed numerous test cases. In these test cases,

the California Judiciary analyzed the operations of the "World Modeling Agency" (James South) and Harold Freeman and similar activities and fashioned a state criminal remedy by acknowledging that the "conduct" involved in the hiring of actors to perform sex acts in motion picture films was, in fact, a form of prostitution, independent of the state criminal obscenity statute; i.e., a violation of its "pandering" statute, Calif. Penal Code Sect. 266 (i) See Associate Justice Arguelles concurring opinion below in People of the State of California V. Harold Freeman 233 Calif.Rptr. 510 at 511. (See Appendix B-5 through B-7).

I concur.
People V. Fixler (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, and People ex. rel. Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523, 529, 142 Cal.Rptr. 338, have unequivocally held that sexual intercourse for hire by models whose

activity is photographed for publication is prostitution. Fixler specifically approved the use of Penal Code section 266i to prosecute a phtoographer and a photo editor of a pornographic firm for the hiring of a young female, for photographic purposes, to engage in lewd acts and sexual intercourse with another male. There is no essential difference between the taking of still photographs for publications and filming for the production of motion pictures.

The dissent interprets Barrows v. Municipal Court (1970) 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483, as clothing the defendant with First Amendment protection from prosecution under California's common pandering statute. Yet a unanimous court of our own District in Fixler cites Barrows as authority for a different principle of law, stating: "The California Supreme Court held in Barrows v. Municipal Court..., that acts which are independently prohibited by law cannot be consummated without sanction merely because they occur in a theatrical setting and we conclude they cannot be consummated without sanction because they occur in the course of preparing material which may ultimately be exhibited in a manner protected by the Constitution. [Citations.]" (People v. Fixler, supra, 56 Cal. App.3d at p.6, 128 Cal. Rptr. 363.)

"The prosecution [for violating section 266i] here was based on

> conduct and was not aimed at prohibiting any communication of ideas. The manner of obtaining the photographs and the ultimate use to which those photographs might be put are separate and unrelated issues. While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which the material was originally obtained, where a crime is committed in obtaining the material, the protection afforded its dissemination would not be a shield against prosecution for the crime committed in obtaining it." (People V. Fixler, supra, 56 Cal.App.3d at pp. 325-326, 128 Cal.Rptr. 363.)

The rationale for that development in California Criminal Law is set forth in Associate Justice Arguelles' dissent in People of the State of California V. Harold Freeman 234 Cal.Rptr. 245 at 247 (See Appendix C-10 through C-13).

> I respectfully dissent.
> In 1976, this appellate district held that, "The purpose of the anti-pandering statute (Pen.Code, § 266i) is to '...cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively

combating the evil sought to be condemned.' [Citations.]" (People v. Fixler (1976) 56 Cal. App. 3d 321, 327, 128 Cal.Rptr. 363.)

Engaging in the process of inductive reasoning to ascertain just what "evil" the anti-pandering statute seeks to condemn, we can trace that evil from the statute's language. "The term 'procure,' as it is used in the statute with relation to the crime of pandering, has a very definite and well understood meaning. A procurer is one who exploits the virtue of a female by soliciting trade for a lewd and lascivious woman to gratify the lusts of other persons. A procurer is an agent who promotes prostitution. [Citations.] The result of soliciting patronage as the agent of a depraved woman is equally harmful to society whether the procurer carries on his loathsome trade with or without her consent." (People v. Cimar (1932) 127 Cal.App. 9, 13, 15 P.2d 166, emphasis added.)

As far as the Legislature and the courts are concerned, the evils of promoting prostitution did not change between the time People V. Cimar, supra, 127 Cal. App. 9, 15, P.2d 166 was decided and the time People v. Fixler, supra, 56 Cal.App.3d 321, 128 Cal.Rptr. 363, was decided 44 years later, just as the Legislature's three amendments to the anti-pandering statute in the 10 years that have passed since Fixler was decided have not specifi-

cally excepted still picture photographers or photo editors (or movie producers) from those who are subject to prosecution and conviction for pandering under the statute just because they are snapping pictures or rolling film.

While the "evil" to be condemned has not changed, the form of the promotion (of prostitution) and exploitation (of others' virtue for lustful gratification) has changed. When Cimar was decided, the "evil" usually took form in houses of prostitution (see Pen. Code, § 266i, subds. (c), (d); as the court there concluded, "the legislature evidently intended to discourage the nefarious business of replenishing houses of prostitution with inmates." (People v.Cimar, supra, 127 Cal.App. at p. 14, 15 P.2d 166.) Now, however, the "evil" may also take the form of celluloid film or magnetic videotape of sex acts, performed for money, that can be played and replayed in movie theatres and on home video cassette players. I do not, however, believe that this change in form has changed the nature of the promotion and exploitation involved. One need look no further than count II here to see that the defendant promoted the prostitution of, and exploited, the owner of the residence where the filming occurred, a woman who had no acting experience and considered herself naive but had a desire or fantasy to be an "act-

> ress." Defendant promoted the loss of, and exploited, her naivete in the gratification of others' lust through the medium of filmed sexual acts by employing her to engage in various sexual acts including intercourse before the camera, for which he paid her $200.00. Such on-location recruiting of neophytes is the same "nefarious business of replenishing," with respect to an industry which exploits the performance of sex acts for money, that the Cimar court found the Legislature intended to discourage with respect to houses of prostitution. Then, as now, the person's consent is immaterial.

During that same period, the United States Attorney for the Western District of Missouri applied Justice Burke's analysis in Trans Lux and the analysis in People V. Fixler, supra, described by Justice Arguelles, above in Freeman, supra, and brought a criminal Mann Act prosecution against John Victor Roeder for transporting a female across state lines for the purpose of participating in various sexual acts for hire for the purpose of producing a movie

depicting these acts. In United States v. Roeder 526 F.2d 736, the United States Court of Appeals for the Tenth Circuit (Hill, Seth and Doyle) upheld the U.S. Attorney's analysis and affirmed the conviction of a Mann Act violation, independent of the question whether the film itself was, in fact, obscene.

In the absence of a definitive resolution by this Court of the underlying "lewd conduct-free speech" federal question which Jacobellis V. Ohio, supra, spawned, the Los Angeles modeling "business" conducted by "World Modeling Agency" (James South) has openly flourished, presumably in expectation that the rule of law expressed in People v. Fixler (1976) 56 Cal.App.3d 321 and People of the State of California ex. rel. Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523 at 529 and U.S. V. Roeder 526 F2d

736 would ultimately be overruled by a majority of the justices as this Court's membership changed.

The extent of Jim South's flourishing "modeling" trade is recited in Justice Kaufman's opinion, speaking for the California Supreme Court below. See Appendix A-4 through A-5 and the video tape copy of the PBS documentary, "Death of a Porn Queen" reporting on the background and death of Colleen Applegate, Petitioners' daughter, at age 20, filed with this Court, as exhibit 6 to Petitioners' brief amicus curiae filed in Fort Wayne Books, Inc. v. Indiana No. 87-470. See also Appendix D-3 through D-4 to this petition. It was during this flourishing period of 24 years of hard core pornographic motion picture production, that Colleen Applegate, at age 18, made the mistake of leaving the shelter

of her family and home in Farmington, Minnesota to enter the modeling business in Los Angeles, in her determination to be someone. There she fell prey to the seductive promises of Jim South's "World Modeling Agency." Today that unlawful business and moral public nuisance continues to operate -- due to the erroneous analysis and largesse of Associate Justice Kaufman which overruled Freedman's conviction.

Petitioners contend that that portion of Associate Justice Kaufman's opinion which analyzes the "lewd conduct-free speech" federal question, and concludes that "lewd conduct," such as that which appears in "Caught From Behind II" is protected conduct when placed on film, and cannot be proscribed without a determination that such films are obscene as a whole is shown to be patently in error when subjected to

the fundamental principles and clear logic of Justice Burke's opinion in Trans Lux and other cases which were never placed before the California Supreme Court either in the briefing or oral argument of the California Attorney General. The unanimity of the California Justices in Freeman, supra, can be attributed to the latter fact. See here, at Appendix I, the news article dated December 11, 1987, in the Los Angeles Times, which reported on the oral arguments. That Court was misled by the failure of the People to respond to the questioning of Justice Kaufman and Panelli with the Trans Lux principles.

The unanimity of the California Justices in Freeman and the decision of the Attorney General, representing the People of the State of California not to argue the Trans Lux principles

and not to petition this Court for review must also be attributed to the silence of this Court during the past 24 years and its failure to reaffirm the fundamental principles and values expressed in Justice Burke's analysis and the opinions set forth above.

When Petitioners' attorney was informed that the analysis of Associate Justice Burke in Trans Lux had not been placed before the California Supreme Court and became aware that the Attorney General of the State of California might not petition for a rehearing because the decision of the California Supreme Court was unanimous, he filed a timely motion on Sept. 9, 1988, the latter portion of which asked the Court on its own motion, to reexamine the issues in the light of Judge Burke's Trans Lux analysis (see arguments at Appendix D to this petition). There-

after, such motion was considered by the Court on Sept. 14, 1988 which extended its jurisdiction to Oct. 24, 1988 to permit the Court to consider Petitioners' motion. On Oct. 21, 1988, the California Supreme Court filed its order (see Appendix E) which denied the Petitioners' motion which requested the Court to grant a rehearing on its own motion. Petitioner contends that the Court's consideration of such motion qualifies Petitioners as "intervenors" below and thus "parties," who are authorized to file this petition for a Writ of Certiorari under Rule 20.4 of the Rules of the United States Supreme Court. Only a "party" to the proceeding can make a motion therin. Difani V. Riverside County Oil Co. (1927) 201 Cal. 210, 214, 6 Witkin, California Procedure (Third Edition) at page 329. See also, Stern, Gressman and Shapiro, Supreme Court

Practice (Sixth Edition) at pages 338-342, §6.16, "What Parties May Petition for Certiorari - Intervention in the Supreme Court"; pp. 44-47, §2.4 Invocation of Certiorari Jurisdiction by "any party" to case below. See, also, Forms at pp. 855-860 based upon Hunter V. Ohio Ex. Rel. Miller 396 US 879 (1969).

REASONS FOR GRANTING INTERVENTION AND THE WRIT OF CERTIORARI

1. THE FIXLER CRIMINAL REMEDY IS CRUCIAL TO OBSCENITY LAW ENFORCEMENT. FIXLER MUST BE REHABILITATED AS A LAW ENFORCEMENT WEAPON.

The criminal remedy which was applied in People of the State of California v. Harold Freeman, supra, has long been a part of California law, having been tested and upheld in People v. Fixler 56 Cal.App.3d 321, 128 Cal.Rptr. 363

(Mar. 17, 1976, hearing denied May 14, 1976). See the comments of Associate Justice Arguelles in the Court of Appeal below, set forth at pages 25 through 30 supra. Beyond doubt, it is the most important weapon in the arsenal of weapons possessed by law enforcement. The manner in which the statute functions, as demonstrated by the trial facts below, has a deterrent effect on "production" that is devastating to the daily operations of the hard-core pornographic trade. It is not an exaggeration to assert that, properly implemented, it has the capacity for driving hard-core pornographic "production" back underground where it belongs. The detrimental effect of reversing Fixler cannot be overemphasized. Not only will it preclude the use of this remedy in California, where most of the hard-core pornography is produced, but it also will cast a

doubt over its validity and deter other centers of production from adding it to their arsenal of weapons.

The adverse effect that the California Supreme Court's erroneous analysis of the "lewd conduct-free speech" federal question in People of the State of California v. Harold Freeman et al., supra, will have, as precedent, on law enforcement efforts across this country, requires that this Court assume jurisdiction and correct such error in a timely fashion. This Court's failure to timely correct such error will only magnify the harm caused by this Court's 24 years of silence on this issue, as set forth above in the Statement of the Case.

One example of the deleterious effect, is the recent reliance in a Minnesota case, State of Minnesota v. Robert Walter Bonynce, Fourth Judicial District Court, Division Four, Edina,

County of Hennepin in Point I of a defense attorney's "Memorandum of Points and Authorities in Support of Defendant's Motion" to dismiss five separate gross misdemeanor counts which allege violations of the Minnesota Bestiality Statute incident to the production of a video tape involving sexual intercourse with a Rotweiller dog. A copy of that argument is set forth at Appendix J.

Further, if the Freeman decision is allowed to stand on the federal question, it will undercut the rudimentary principles which permit the Mann Act to be invoked when the producers of such films transport such actors across state lines in the production of such films. See U.S. v. Roeder 526 F2d 736 at 737, 738 (10th Cir 1975). Justice Kaufman's erroneous analysis, if allowed to stand, will affect the discretion of many U.S. Attorneys, who will refuse

to authorize such federal charges when prepared by law enforcement personnel, notwithstanding Justice Kaufman's efforts to distinguish the Roeder case, based upon the shadow of doubt generated by his faulty analysis.

2. CALIFORNIA PENAL CODE SECTION 266 (i) IS CONSTITUTIONAL ON ITS FACE

Associate Justice Kaufman was clearly in error in his analysis, see People v. Freeman 250 Cal.Rptr. 598 at 602-603, Footnote 6, that First Amendment considerations...compel the conclusion that People v. Fixler, supra was wrongly decided and must be reversed. The basic constitutional principles expressed by New York Associate Justice Burke in Trans Lux Dist. Corp. v. Board of Regents 248 NYS2d 857 (1964) and Justice Arguelles, speaking in the court below in People v. Freeman 233 Cal.Rptr. 510

at 511, demonstrate the contrary. See Petitioners' argument at pages 8 through 19 of their brief, filed with their motion in the California Supreme Court on Sept. 12, 1988, a copy of which appears herein at Appendix D-15 through D-37 to this petition. Further, this is not a case where this Court should defer to lower court constructions of state statutes, see Frisby v. Schultz 487 U.S._____ 101 LEd2d 420 at 430, 108 SCt _____June 27, 1988, where this Court construed the picketing "ban to be a limited one; only focused picketing taking place solely in front of a particular residence is prohibited." If necessary, the "lewd conduct" within the ambit of the statute could just as easily be limited to the type of hard-core sexual conduct engaged in by the producers of "Caught From Behind II" (see time and motion study of "Caught From Behind

II", filed with this Court as Exhibit 1 to this petition), and any hard core sexual conduct which is "claimed" as being outside such proscription, such as that described in the Los Angeles Times article dated Nov. 18, 1987, appearing at Appendix I-5, I-6 can be urged as an affirmative defense which is suggested by the Model Penal Code for the obscenity crime.

3. CALIFORNIA PENAL CODE SECTION 266 (i) IS CONSTITUTIONAL AS APPLIED TO THE PRODUCTION OF THE FILM "CAUGHT FROM BEHIND II"

In his analysis in Freeman, supra, at page 602-603, Justice Kaufman holds that California Penal Code Section 266 (i) cannot constitutionally be applied to the production of the film "Caught From Behind II". (See Appendix A-11 through

A-12). The trial court facts clearly demonstrate the contrary. See, in this regard, the copy of the time and motion study of the film "Caught From Behind II," filed with this Court as Exhibit 1 to this Petition. The original time and motion study was filed with the California Supreme Court on Sept. 12, 1988 as Exhibit 6 to Petitioners' motion, (see Appendix D at page D-7)

4. RULE 17.1 (b) OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN

Rule 17.1 (b) of the Rules of the U.S. Supreme Court supports the granting of the Petition for Writ of Certiorari herein. The California Supreme Court decided the above stated "lewd conduct-free speech" federal question in a way which is in direct conflict with the

opinions of the Ohio Supreme Court in A Film Entitled "Vixen" et al. v. State of Ohio Ex. Rel. Charles H. Keating, Jr., supra, the New York Court of Appeals in Trans Lux Distributing Corp. v. Board of Regents of the University of the State of New York, supra, and the Georgia Supreme Court in Evans Theater Corp. et al. v. Lewis R. Slaton supra, as set forth above in the Statement of the Case.

5. RULE 17.1 (b) OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE GRANTING OF THE PETTION FOR WRIT OF CERTIORARI HEREIN

Rule 17.1 (b) of the Rules of the U.S. Supreme Court supports the granting of the Petition for Writ of Certiorari herein. The California Supreme Court decided the above "lewd conduct-free speech" federal question in a way which

is in direct conflict with the opinion of the U.S. Court of Appeals for the 10th Circuit in U.S. v. Roeder 526 F2d 736 (1975), cert denied by this Court in 426 US 905.

6. RULE 17.1 (a) OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN

Rule 17.1 (a) of the Rules of the U.S. Supreme Court supports the granting of the Petition for Writ of Certiorari herein. The above stated "lewd conduct-free speech" federal question has been on the docket of this Court for the past 24 years in both manditory appeals and discretionary petitions for Writs of Certiorari, and has not yet been, but should be, settled by this Court a timely fashion at this time. Further,

substantially the same federal question is presently before this Court in the grant of a Petition for Certiorari in Texas v. Johnson _____US_____, see also, 49 CCH Supreme Court Bulletin at page 132.

7. THE EQUITY PRINCIPLES UNDERLYING THE PRIVATE ATTORNEY GENERAL CONCEPT AT THE TRIAL LEVEL SUPPORT THE FILING AND GRANTING OF THIS PETITION FOR WRIT OF CERTIORARI HEREIN AT THE APPELLATE LEVEL

The equity principles underlying the modern private attorney-general concept, which authorize the filing of a lawsuit to "vindicate a policy which is considered to be of the highest priority," see County of Inyo v. City of Los Angeles 78 Cal.App.3d 82 at 89, fN1, 144 Cal.Rptr. 71, at 75 footnote 1 Newman v. Piggie Park Enterprises 390

US 400 at 401 Footnote2, should apply with equal force at the appellate level so as to authorize this filing of a petition for Writ of Certiorari, as a private attorney general, where such filing will "vindicate a policy which is considered to be of the highest order"; alternatively, this Court should consider inviting the law enforcement officials named as real parties in interest herein to file responses expressing the views of the state and federal governments relative to both the Petitions to Intervene and for Writ of Certiorari. See Stern, Gressman and Shapiro, Supreme Court Practice (Sixth Edition) at page 47 footnote 1.

8. RULE 20.4 OF THE RULES OF THE UNITED STATES SUPREME COURT SUPPORTS THE FILING AND GRANTING OF THE PETITION FOR WRIT OF CERTIORARI HEREIN.

Petitioners have standing under Rule 20.4 to seek review of the "lewd conduct-free speech" because they were parties in intervention below, based upon the California Supreme Court's consideration of their motion. Difani v. Riverside County Oil Co. (1927) 201 Cal. 210, 214; 6 Witkin, Calif. Procedure (Third Edition) at page 329; Rule 20.4 of the Rules of the U.S. Supreme Court; 28 USC §1257 (3).

Further, the interests of justice require that Petitioners be admitted as parties or as intervenors for the first time at the Supreme Court level because of the adverse effect such erroneous judgment will have on their present efforts to put an end to the nationwide broadcast of "reruns" on Satellite T.V. of similar patently offensive sexual conduct performed by their deceased daughter, Colleen Applegate, aka Shauna

Grant during the years 1982-1984 in films for Respondent's co-conspirator, "World Modeling Agency" (Jim South) under the aegis of this erroneous rule of federal law. The seduction of Colleen by World Modeling Agency was made possible by this Court's 24 years of "silence" and avoidance of the underlying "lewd conduct-free speech" federal question. The sub-silentio rule of federal law which provided the aegis for Freeman and others has now been made express by the California Supreme Court in Freeman. During the past year, Petitioners have sought the assistance of New York and California state and federal attorneys, and the U.S. Attorney General to enjoin the successive satellite T.V. reruns of their deceased daughter's 29 hard-core pornographic films produced by the porno industry during 1982-1984, both on the grounds: (1) that such films are obscene

and in violation of state and federal obscenity and conspiracy statutes, U.S. v. Sandys et al. 605 F2d 210 (CA6th 1979) Cert. denied in Gordon v. U.S., and Friedlander v. U.S. 444 U.S. 984 (Dec. 3, 1984), and on the grounds, (2) that such films may be enjoined independent of the obscenity laws under the principles of law expressed in Trans Lux Distributing Corp. v. Board of Regents, supra, Evans Theater Corp. et al. v. Slaton, supra, Ohio ex. rel. Keating v. Vixen supra, and U.S. v. 37 Photographs 402 US 363 at 377. The past reluctance of federal authorities to act by way of injunction because of this Court's silence has recently been effectively offset by the new tools given by Congress to federal authorities in its recently enacted federal legislation in November of 1988 on satellite and cable T.V. and the interaction of those

new statutes on the use of the federal injunction allowed by 19 USC section 1305(a) and U.S. v. 37 Photographs. Petitioners will be further harmed in their efforts to stimulate such law enforcement officials to action upon the "conspiracy" theory set forth in Sandys supra, if the Freeman decision is allowed to stand.

CONCLUSION

In his concurring opinion in Pope v. Illinois 491 US ____, 95 L.Ed.2d 439 at 447-448, Justice Scalia suggested a need for reexamination of Miller v. Calif. 413 US 15, 37 L.Ed.2d, 419 (1973). Petitioners submit that the trial facts and "lewd conduct-free speech" federal question raised herein present an ideal background for such a reexamination.

The criminal remedy which was applied in the Trial Court in People of the State of California v. Harold Freeman has long been a part of California law, having been

tested and upheld in People v. Fixler 56 Cal.App.3d 321, 128 Cal.Rptr. 363 (Mar. 17, 1976, hearing denied May 14, 1976). The manner in which Fixler functions provides a major deterrent to the business operations of the producers and manufacturers of visual hard-core pornography. Properly implemented, this law enforcement weapon has the capacity for driving all visual hard-core pornography production back underground where it existed 30 years ago (circa 1957).

Because the Fixler criminal remedy is crucial to law enforcement in the centers of production and manufacture, Fixler must be rehabilitated by this Court accepting jurisdiction over Freeman, and setting this basic "lewd conduct-free speech" federal question for argument in tandem with Texas v. Johnson No. 88-155.

The California Supreme Court's opinion is predicated upon that Court's misunderstanding as to the extent of a state's

powers in this "lewd conduct-free speech" controversy. Three state Supreme Courts (New York, Ohio and Georgia) and one Court of Appeals (10th Circuit) have analyzed the same issue and arrived at a contrary answer. This Court should resolve this federal controversy and, thereafter, remand Freeman for further reconsideration by the California Supreme Court.

Respectfully submitted,

James J. Clancy
9055 La Tuna Canyon Rd.
Sun Valley, CA 91352
(818) 352-2069
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of December 1988, the original and 40 copies of the within Petition For Leave To Intervene And Petition For Writ Of Certiorari To The Supreme Court of California and 10 copies of Exhibit 1 thereto, were deposited in the United States Post Office in Van Nuys, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies and one copy of exhibit 1 thereto were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served.

Mr. Dennis A. Fischer
1448 15th Street, Suite 100
Santa Monica, California 90404

Lauren E. Dana
Office of the Attorney General
3580 Wilshire Blvd. Room 800
Los Angeles, California 90010

Ira Reiner
Office of the District Attorney
18-000 Criminal Courts Building
210 West Temple Street
Los Angeles, California 90012

James K. Hahn
Office of the City Attorney
Hall E, Room 1800
Los Angeles, California 90012.

James J. Clancy
9055 La Tuna Canyon Road
Sun Valley, California 91352
(818) 352-2069
Attorney for Petitioners.

APPENDIX A

OPINION OF CALIFORNIA SUPREME COURT IN PEOPLE V. HAROLD FREEMAN 46 Cal. 3d 419 (AUG. 25, 1988) REVERSING ON FIRST AMENDMENT GROUNDS, THE RULE OF LAW EXPRESSED IN 1976 IN PEOPLE V. FIXLER, AND RESOLVING THE "LEWD CONDUCT-FREE SPEECH" FEDERAL QUESTION IN A MANNER CONTRARY TO THAT OF THE NEW YORK, OHIO, AND GEORGIA SUPREME COURTS AND THE TENTH CIRCUIT COURT OF APPEALS.

eference: Motion For Leave to Intervene and Petition for Writ of Certiorari, at pages 2, 32, and 43)

The PEOPLE, Plaintiff and Respondent,

v.

Harold FREEMAN, Defendant and Appellant.

No. S000070.

Supreme Court of California, In Bank.

Aug. 25, 1988.

Defendant was convicted in the Superior Court, Los Angeles County, James A. Albracht, J., of pandering, and he appealed. The Court of Appeal, 233 Cal.Rptr. 510, affirmed. The Supreme Court granted review, superseding opinion of Court of Appeal. The Supreme Court, Kaufman, J., held that: (1) defendant did not "procure another person for the purpose of prostitution" within meaning of pandering statute when he hired and paid actors to perform in nonobscene commercial film which portrayed sexually explicit acts, and (2) First Amendment precluded application of pan-

dering statute to hiring of actors to perform in production of nonobscene motion picture which portrayed sexually explicit acts.

Reversed.

Lucas, C.J., and Eagleson, J., concurred in judgment.

1. Prostitution ⇐1

Defendant did not procure another person for purpose of prostitution within meaning of pandering statute when he hired and paid actors to perform in nonobscene commercial film which portrayed sexually explicit acts, absent evidence that defendant paid acting fees for purpose of sexual arousal or gratification of himself or actors. U.S.C.A. Const.Amend. 1; West's Ann.Cal.Penal Code § 266i.

2. Constitutional Law ⇐90.1(6)
Prostitution ⇐1

First Amendment precluded application of pandering statute to hiring of actors to perform in production of nonobscene motion picture which portrayed sexually ex-

plicit acts. West's Ann.Cal.Penal Code § 266i; U.S.C.A. Const.Amend. 1.

Stuart Goldfarb and Dennis A. Fischer, Santa Monica, for defendant and appellant.

John K. Van de Kamp, Atty. Gen., Steve White, Chief Asst. Atty. Gen., Mark Alan Hart, Robert R. Anderson and Lauren E. Dana, Deputy Attys. Gen., for plaintiff and respondent.

KAUFMAN, Justice.

Defendant Harold Freeman hired and paid actors to perform in a nonobscene commercial film which portrayed sexually explicit acts. On that account he was charged with and convicted of five counts of pandering—procurement of persons "for the purpose of prostitution"—under Penal Code section 266i. He appealed contending his conduct did not constitute the crime of pandering. The Court of Appeal affirmed the judgment of conviction.

This court granted review because of First Amendment concerns and the state-

wide significance of the issues. Because of the language of the statutes involved and because construction of the pandering statute to make it applicable to the hiring and payment of actors to perform in a nonobscene motion picture would unlawfully impinge upon protected First Amendment rights, we are compelled to conclude the pandering statute was not intended to and does not apply to the conduct here involved and that defendant's convictions of pandering must be reversed.

I. FACTS

Defendant Freeman is the president of Hollywood Video Production Company (Hollywood Video), which is in the business of producing and marketing "adult" films. In September 1983 defendant produced and directed a film called "Caught from Behind, Part II." Defendant hired actors and actresses to perform in the film. As part of their roles, the performers engaged in various sexually explicit acts, including sexual intercourse, oral copulation and sodomy.

All the filming was done in the private residence of Nancy Conger, and was not open to the public. Conger was paid for the use of her home in the making of the film. She also asked if she could act in the film. Defendant agreed Conger could be in the film. With the exception of Nancy Conger, all the actors and actresses in the film were cast through the World Modeling Agency operated by Jim South. Defendant paid each actor for his or her performance in the film, and paid an additional fee to South for each performer from World Modeling Agency who had been cast for a role in the film.

Defendant was charged with five counts of pandering (Pen.Code, § 266i) based on the hiring of five actresses who performed sex acts in the film.[1] Defendant was not charged with any violation of the obscenity laws (Pen. Code, § 311 et seq.) in connection with production or distribution of the

---

1. Although both male and female actors were hired and paid and although both participated in the sexually explicit conduct, the criminal charges were based solely on the conduct of the female actors.

film and there was no determination the film was obscene.[2]

After a jury trial, defendant was found guilty on all five counts. Defendant was placed on five years probation[3] and ordered as conditions of probation to serve 90 days in the county jail and pay restitution of $10,000 under Penal Code section 1203.-04 and a $100 restitution fine under Government Code section 13967, subdivision (a).

---

2. All further statutory references are to the Penal Code unless otherwise stated.

3. Section 1203.065 prohibits the granting of probation for a conviction of pandering. The trial court found, however, that imposition of a prison term would constitute cruel and unusual punishment for defendant's conduct and placed defendant on probation notwithstanding section 1203.065. The People appealed the granting of probation, which was affirmed by the Court of Appeal. Review of that decision is pending in this court in a separate proceeding (S000319, review granted Apr. 16, 1987). In view of our conclusion the judgment of conviction must be reversed because the conduct did not constitute pandering, the review of the probationary sentence will become moot.

II. DISCUSSION

The issues and contentions in this case and their resolution are pervaded by a central fact. The film was not determined to be obscene and for purposes of this review must be deemed to be not obscene. Thus the prosecution of defendant under the pandering statute must be viewed as a somewhat transparent attempt at an "end run" around the First Amendment and the state obscenity laws. Landmark decisions of this court and the United States Supreme Court compel us to reject such an effort.

A. *The Statutory Language*

[1] The pandering statute under which defendant was convicted provides in pertinent part: "Any person who: (a) procures another person for the purpose of prostitution ... is guilty of pandering, a felony...."[4] (§ 266i.)

---

4. Section 266i reads in full as follows: "Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises,

"Prostitution" is not defined in section 266i. Rather, the definition of "prostitution" derives from Penal Code section 647,

---

threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years."

subdivision (b): "'[P]rostitution' includes any *lewd act* between persons *for money or other consideration*." (Italics added.)

The People argue that the actors and actresses in the film engaged in acts of prostitution—i.e., sexual acts for money—because they performed the acts before the movie cameras "for the money they received." Thus, the People argue, defendant was guilty of procuring the actors "for the purpose of prostitution." The People's syllogism is flawed in significant regards.

First, the definition of "prostitution" (and ultimately, therefore, the definition of "pandering") depends on the definition of a "lewd act." In *Pryor v. Municipal Court* (1979) 25 Cal.3d 238, 158 Cal.Rptr. 330, 599 P.2d 636 this court construed the term "lewd conduct" for purposes of prosecution under section 647, subdivision (a), proscribing lewd or dissolute conduct in a public place, a provision related to the prohibition against prostitution contained in section 647, subdivision (b). In *Pryor* we held that a "lewd act" requires "touching of the genitals, buttocks, or female breast *for the purpose of sexual arousal, gratification,*

annoyance or offense...." (Italics added. *Id.*, at p. 256, 158 Cal.Rptr. 330, 599 P.2d 636.) The definition of a "lewd act" for purposes of section 647, subdivision (b) evolved from *Pryor* and was applied to "prostitution" in *People v. Hill* (1980) 103 Cal.App.3d 525, at pages 534–535, 163 Cal. Rptr. 99 as follows: '[F]or a 'lewd' or 'dissolute' act to constitute 'prostitution,' the genitals, buttocks, or female breast, of either the prostitute or the customer must come in contact with some part of the body of the other for the purpose of *sexual arousal or gratification of the customer or of the prostitute.*" (Italics added.)

One contention of defendant is that requisite to the crime of prostitution is the existence of a "customer" and there being no "customer" here, no prostitution was involved and therefore no procurement for purposes of prostitution and no pandering. We find it unnecessary to address that contention. Whether or not prostitution must always involve a "customer," it is clear that in order to constitute prostitution, the money or other consideration must be paid *for the purpose of sexual arousal or gratification.*

The payment of acting fees was the only payment involved in the instant case. This payment was made to the actors for performing in a nonobscene film. There is no evidence that defendant paid the acting fees for the purpose of sexual arousal or gratification, his own or the actors'. Defendant, of course, did not himself participate in any of the sexual conduct. Defendant, the payor, thus did not engage in either the requisite conduct nor did he have the requisite mens rea or purpose to establish procurement for purposes of prostitution.[5]

B. *First Amendment Considerations*

[2] However, even if defendant's conduct could somehow be found to come within the definition of "prostitution" literally, the application of the pandering statute to

---

5. There is also something tautological in the argument that the very acting fees by which defendant "procured" the actors ("for the purpose of prostitution") *also* constitute the payment necessary to establish the "prostitution" for which the actors are assertedly being "procured."

the hiring of actors to perform in the production of a nonobscene motion picture would impinge unconstitutionally upon First Amendment values.

It is the duty of this court in construing a statute to ascertain and give effect to the intent of the Legislature. (*Scala v. Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 366, 90 Cal.Rptr. 592, 475 P.2d 864; *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1979) 88 Cal.App.3d 43, 53, 152 Cal.Rptr. 153.) And it is fundamental that the Legislature will not be presumed to intend unconstitutional results. (*People v. Smith* (1983) 34 Cal.3d 251, 259, 193 Cal.Rptr. 692, 667 P.2d 149; *In re Kay* (1970) 1 Cal.3d 930, 942, 83 Cal.Rptr. 686, 464 P.2d 142.) "[W]here '"the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution."' [Citations.]" (*People v. Davenport* (1985) 41 Cal.3d 247, 264, 221 Cal. Rptr. 794, 710 P.2d 861; accord: *United States v. Delaware & Hudson Co.* (1909)

213 U.S. 366, 407–408, 29 S.Ct. 527, 535–536, 53 L.Ed. 836.)

Regardless of our view of the social utility of this particular motion picture, our analysis must begin with the premise that a nonobscene motion picture is protected by the guarantee of free expression found in the First Amendment. (*Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 502, 72 S.Ct. 777, 780, 96 L.Ed. 1098; *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 689, 68 Cal.Rptr. 721, 441 P.2d 281; *Flack v. Municipal Court* (1967) 66 Cal.2d 981, 988, 59 Cal.Rptr. 872, 429 P.2d 192; *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 824, 83 Cal.Rptr. 819, 464 P.2d 483.)

In *Barrows v. Municipal Court, supra*, 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483 this court considered the applicability of criminal penalties under the vagrancy law, section 647, subdivision (a), to the live performance of a play in a theater before an audience. Although the opinion does not detail precisely what occurred, two performers, the producer and the director of the play apparently were prosecuted on account of sexually related conduct that

occurred during the performance of the play.

We first noted that performance of a live play comes within the same First Amendment protection as motion pictures. The vagrancy law there at issue, section 647, subdivision (a), with its attendant requirement of lifetime registration as a sex offender, was allied to other sections prohibiting various kinds of sexual misconduct. Nothing in its history or context suggested that it was intended to apply to theatrical performances that came within the ambit of the First Amendment. The criminal penalties of the statutes there at issue, if applied to a live theatrical performance, would not only have involved serious equal protection problems, but as we stated, it was "too evident to require elaboration" that such penalties "would have an inhibiting effect upon the exercise of First Amendment rights." (*Barrows v. Municipal Court, supra*, 1 Cal.3d 821, 827, 83 Cal.Rptr. 819, 464 P.2d 483.) We concluded that section 647, subdivision (a), was not intended to apply to live theatrical performances before an audience.

Since the acts involved here have not been adjudged obscene, they are within the protection of the First Amendment. To subject the producer and director of a nonobscene motion picture depicting sexual conduct to prosecution and punishment for pandering, including a special provision for ineligibility for probation attendant on such a conviction (see fn. 2, ante), would rather obviously place a substantial burden on the exercise of protected First Amendment rights. To include the hiring and paying of actors for acting in such a film within the definition of pandering would therefore unconstitutionally infringe on First Amendment liberties. Consistent with *Barrows*, *Burstyn*, *Burton* and *Flack* and consistent with the principles of statutory construction outlined above we are thus compelled to conclude that the Legislature did not intend the antipandering law to apply to the payment of acting fees for performance in a nonobscene motion picture. We observe that if section 266i were applied in the manner urged by the People, it would include within the literal sweep of the statutory language films of unquestioned artis-

tic and social merit, as well as films made for medical or educational purposes. We reaffirm our observation in *Barrows*, "any more restrictive rule could annihilate in a stroke much of the modern theater and cinema." (*Barrows v. Municipal Court*, *supra*, 1 Cal.3d 821, 831, 83 Cal.Rptr. 819, 464 P.2d 483.)

Placing reliance on *People v. Fixler* (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, the People argue that there is a distinction between "speech" (e.g., a film), which is constitutionally protected under the First Amendment so long as it is not obscene, and "conduct" (the making of the film) which may be prohibited without reference to the First Amendment. Such a distinction is untenable in this case. In *United States v. O'Brien* (1968) 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 the United States Supreme Court set forth standards to determine the constitutional propriety of governmental regulation of "conduct" which also contains elements of "speech." The factors to be considered are (1) whether the regulation is within the constitutional power of the government, (2) whether

the governmental interest is important or substantial, (3) whether the governmental interest is unrelated to the suppression of free expression, and (4) whether the incidental restrictions on alleged First Amendment interests is no greater than is essential to the furtherance of the interest. (*Id.*, at p. 377, 88 S.Ct. at p. 1679.)

Even if the regulation attempted here were within the constitutional power of the Legislature and the governmental interest could be found to be important, the application of section 266i in the manner advocated would clearly run afoul of the requirement that the governmental interest be unrelated to the suppression of free expression. The People have advanced two possible governmental interests: First, is the prevention of profiteering from prostitution, and second is a public health purpose, e.g., prevention of the spread of sexually transmitted diseases, such as AIDS. The governmental interest served by section 266i has been stated to be the prevention of recruitment to prostitution or of augmentation of the supply of available prostitutes. (*People v. Hashimoto* (1976) 54 Cal.App.3d

862, 867, 126 Cal.Rptr. 848; *People v. Courtney* (1959) 176 Cal.App.2d 731, 741, 1 Cal.Rptr. 789.) Punishment of a motion picture producer for the making of a nonobscene film, however, has little if anything to do with the purpose of combatting prostitution. Rather, the self-evident purpose of the prosecuting authority in bringing these charges was to prevent profiteering in *pornography* without the necessity of proving obscenity. The fact that the People concede that a film identical to that in this case could be made lawfully if the performers were not paid also belies the asserted "public health" interest. Both these suggested "interests" not only directly involve the suppression of free expression but are, in the context of a pandering prosecution for the making of a nonobscene motion picture, not credible.

The People's reliance upon *People v. Fixler, supra*, 56 Cal.App.3d 321, 128 Cal. Rptr. 363 to support defendant's conviction otherwise is also misplaced. First, the *Fixler* court failed to give sufficient consideration to the whole holding of this court in

Barrows, supra, 1 Cal.3d 821; 83 Cal.Rptr. 819, 464 P.2d 483. Secondly, *Fixler* is factually distinguishable from the instant case in a rather fundamental way. In *Fixler*, the defendants were a photo editor and photographer for American Art Enterprises, a publisher of sexually explicit magazines. The photographers obtained "models" from modeling agencies and paid fees to the models, who were photographed engaging in various types of sexual activity, from masturbation to oral copulation and sexual intercourse. The defendants in that case were convicted of pandering based on the use of one "model," a 14-year-old girl. The Court of Appeal upheld the conviction, making the flat statement that "There can be no question but that Patricia engaged in lewd acts and sexual intercourse for money ..." (*id.*, 56 Cal.App.3d at p. 325, 128 Cal. Rptr. 363) and that the defendants had therefore procured her "for purposes of prostitution."

The bald conclusion reached by *Fixler*, and reiterated in the related case of *People ex rel. Van de Kamp v. American Art*

Enterprises, Inc. (1977) 75 Cal.App.3d 523, at page 529, 142 Cal.Rptr. 338, that "sexual intercourse for hire by ... models [or actors] whose activity is photographed for [publication] ... is prostitution" simply ignores the First Amendment considerations that compel our contrary conclusion here.[6]

Moreover, the *Fixler* court's conclusion was based primarily on a misinterpretation of a portion of this court's opinion in *Barrows v. Municipal Court, supra*, 1 Cal.3d 821, 830, 83 Cal.Rptr. 819, 464 P.2d 483. We there stated that "acts which are *independently prohibited by law* [cannot] be consummated without sanction ... merely

---

6. To the extent that *People v. Fixler, supra*, 56 Cal.App.3d 321, 128 Cal.Rptr. 363, *People ex rel. Van de Kamp v. American Art Enterprises, Inc., supra*, 75 Cal.App.3d 523, 142 Cal.Rptr. 338, and *People v. Zeihm* (1974) 40 Cal.App.3d 1085, 115 Cal.Rptr. 528 hold that the payment of wages to an actor or model who performs a sexual act in filming or photographing for publication constitutes prostitution regardless of the obscenity of the film or publication so as to support a prosecution for pandering under section 266i, they are disapproved.

because they occur during the course of a theatrical play. Dramatic license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero." (Italics added.)

The *Fixler* court correctly paraphrased our language in *Barrows* in stating: "The fact that a motion picture of an actual murder, rape or robbery in progress may be exhibited as a news film or a full length movie without violating the law does not mean that one could with impunity hire another to commit such a crime simply because the primary motivation was to capture the crime on film ..." (*Fixler, supra*, 56 Cal.App.3d at p. 326, 128 Cal.Rptr. 363), but erroneously concluded that the defendants there had "hired" the 14-year-old model to commit the independent crime of "prostitution." The conduct was, to be sure, independently unlawful, but it was not prostitution or the procurement of prostitution; the crime was aiding and abetting unlawful sexual intercourse with a minor in violation of section 261.5. (See also *People v. Zeihm, supra*, 40 Cal.App.3d

1085, 115 Cal.Rptr. 528 [cited in *Fixler*, in which the court states (without citation to authority) that exploitation of women in making pornographic movies is prostitution, but the gravamen of which involved the use of females under the age of consent, a violation of section 261.5].)

Undeniably, one cannot lawfully hire another to commit murder, rape or robbery for the purpose of photographing the act. Murder, rape and robbery and aiding and abetting intercourse with a minor for that matter, are crimes independent of and totally apart from any payment for the right to photograph the conduct.

By contrast, the acts of alleged "prostitution" in this case were not crimes independent of and apart from payment for the right to photograph the performance. The determination that pandering and prostitution occurred here was entirely dependent on the payment for the right to photograph. Indeed, under the People's theory the payment was used to establish not only the "hiring" but also elements of both the "pandering" (procuring) and the "prostitution" (i.e., lewd acts "for money"). When

considered aside from the payment of the acting fees, itself fully lawful otherwise, the sexual acts depicted in the motion picture here were completely lawful. The sexual conduct was between consenting adults and occurred in a place not open to the public.[7] And as we have stated, the film was not determined to be obscene.

The People also rely on a number of other California and out-of-state cases to support defendant's conviction, but in each instance their reliance is misplaced.

A New York court in *People v. Kovner* (1978) 96 Misc.2d 414, 409 N.Y.S.2d 349, found a legislative intent on the part of the New York Legislature to include payment for acting in a film containing sexually explicit conduct within the definition of prostitution. However, *Kovner* relied uncritically on *Fixler*, failing to recognize

7. Since decriminalization in 1975, oral copulation and sodomy performed in private between consenting adults are lawful and no longer constitute independently defined crimes. (Stats. 1975, ch. 71, §§ 7, 10, pp. 133–134; Stats.1975, ch. 877, §§ 1, 2, pp. 1957–1958.) Thus *People v. Drolet* (1973) 30 Cal.App.3d 207, 105 Cal.Rptr. 824, cited in *Fixler*, does not support the result in *Fixler*.

that the *Fixler* conviction was based on unlawful sexual conduct with a minor.

In *People v. Maita* (1984) 157 Cal.App.3d 309, 203 Cal.Rptr. 685, a provider of live nude entertainment was convicted of multiple counts of both pimping and pandering. In affirming the convictions, the court relied on *Fixler*, and to the extent it did so its opinion is infirm. Nevertheless, *Maita* is also fundamentally distinguishable from the instant case because it did involve prostitution, the payment by members of the "theater" audience for sexual conduct with the "actors" hired by the theater owner for that purpose. Thus although the theater owner was acquitted on charges of presentation of obscene live conduct (§ 311.6), convictions for procuring persons for purposes of prostitution could properly be affirmed. The Court of Appeal held that the pimping and pandering laws did not prohibit live nude entertainment, but "that the entertainer cannot have sexual relations with the audience." (*Id.*, at p. 316, 203 Cal.Rptr. 685.) Thus, the result in *Maita*

was sound,[8] but it has no application to this case.

The People's reliance on an Oregon case, *State v. Kravitz* (1973) 14 Or.App. 243, 511 P.2d 844, is equally misplaced. That case, like *Maita, supra*, 157 Cal.App.3d 309, 203 Cal.Rptr. 685, involved sexual conduct between a member of the audience and a performer at the defendant's entertainment establishment.

In *United States v. Roeder* (10th Cir. 1975) 526 F.2d 736, the defendant was prosecuted for a violation of the Mann Act (18 U.S.C. § 2421 et seq.) for transporting a woman across state lines for the purpose of performing in a sexually explicit motion picture. The purpose of the Mann Act is, however, quite removed from and has no direct impact upon First Amendment activities. The Mann Act is directed to the conduct of transportation across state lines for an immoral purpose. So far as the Mann Act is concerned the identical conduct

---

8. It appears to us the conduct in *Maita* might also have supported a conviction of section 647, subdivision (a) [lewd conduct in a public place], but that offense was apparently not charged.

would not be criminal if done within a single state. Moreover, *Roeder* is singularly distinguishable from the instant case: There the defendant film producer actually participated in the sexual conduct in the film, for which he transported the woman across state lines.

Thus, the cases relied upon by the People do not support a result different from that which we have reached in this case.

DISPOSITION

For the foregoing reasons, the judgment of the Court of Appeal affirming defendant's pandering conviction based solely on the payment of wages to the actresses in his film, which was not determined to be obscene, is reversed.

MOSK, BROUSSARD, PANELLI and KLINE,* JJ., concur.

LUCAS, C.J., and EAGLESON, J., concur in the judgment.

APPENDIX B

OPINION OF COURT OF APPEAL IN PEOPLE V. HAROLD FREEMAN 233 CAL. RPTR. 510 (JAN. 6, 1987), ADHERING TO RULE OF LAW EXPRESSED IN 1976 IN PEOPLE V. FIXLER, UPHOLDING THE CONVICTION OF HAROLD FREEMAN OF PIMPING AND PANDERING (PENAL CODE SECTION 266(i)), FOR HIRING ACTORS AND ACTRESSES TO PERFORM SEX ACTS IN THE FILM "CAUGHT FROM BEHIND II".

eference: Motion For Leave to Intervene And Petition For Writ of Certiorari, at pages 2, 3, and 25)

The PEOPLE, Plaintiff and Respondent,

v.

Harold FREEMAN, Defendant and Appellant.

B015697.

Court of Appeal, Second District, Division 4.

Jan. 6, 1987.

Review Granted April 16, 1987.

Defendant was convicted in the Superior Court, Los Angeles County, James A. Albracht, J., of violating pandering statute, and he appealed. The Court of Appeal, Kingsley, Acting P.J., held that: (1) act of procuring actresses and actors to perform in sexually explicit film was not protected under First Amendment merely because it occurred within context of motion picture production, and (2) defendant who procured actresses and actors to perform in sexually explicit motion picture was guilty of pandering regardless of any sexual gratification the actors and actresses may have

obtained from their participation in the sexual acts depicted in the film.

Affirmed.

Arguelles, J., filed concurring opinion.

McClosky, J., filed dissenting opinion.

Constitutional Law ⇐90.4(4)

Act of procuring actresses and actors o perform in sexually explicit film was not protected by First Amendment merely because it occurred within context of motion picture production. West's Ann.Cal.Penal Code § 266i; U.S.C.A. Const.Amend. 1.

2. Prostitution ⇐1

Defendant who procured actresses and actors to perform in sexually explicit motion picture violated pandering statute regardless of any sexual gratification the actors and actresses may have obtained from their participation in the sexual acts depicted in the film; actors and actresses testified that they "acted" before cameras "for the money they received." West's Ann.Cal.Penal Code § 266i.

John K. Van de Kamp, Atty. Gen., Mark Alan Hart and Lauren E. Dana, Deputy Attys. Gen., for plaintiff and respondent.

Stuart Goldfarb, Beverly Hills, for defendant and appellant.

KINGSLEY, Acting Presiding Justice.

Defendant is a motion picture producer. He produced a film entitled, "Caught From Behind, Part II." This was a picture containing numerous explicit sexual acts and defendant was prosecuted under section 266i of the Penal Code [1] for procuring actresses and actors to perform in said picture. We affirm his conviction.

---

1. Penal Code section 266i reads: "Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in

I

[1] Much of appellant's opening brief is devoted to a discussion of the application of the First Amendment. That discussion is out of place in this appeal. It is well settled that the distribution of a movie or book is protected by the First Amendment. However, a criminal act is not protected under the First Amendment merely because it occurs within the context of a

---

which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years."

motion picture production.

II

[2] It is immaterial to defendant's conviction that the actors and actresses may or may not obtain any sexual gratification from their participation in the sexual acts depicted in the film. The actors and actresses herein involved were employed to engage in acts or prostitution, which is defined in numerous California cases as the engaging in sexual acts for money. The people herein engaged agreed to and did engage in sexual conduct and testified that they "acted" before the cameras in the production of the motion picture herein in question "for the money they received." The guilt of the defendant of the crime charged and of which he was convicted is clear.

The judgment is affirmed.

ARGUELLES, Associate Justice, concurring.

I concur.

People v. Fixler (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, and *People ex rel.*

Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523, 529, 142 Cal.Rptr. 338, have unequivocally held that sexual intercourse for hire by models whose activity is photographed for publication is prostitution. *Fixler* specifically approved the use of Penal Code section 266i to prosecute a photographer and a photo editor of a pornographic firm for the hiring of a young female, for photographic purposes, to engage in lewd acts and sexual intercourse with another male. There is no essential difference between the taking of still photographs for publications and filming for the production of motion pictures.

The dissent interprets *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 83 Cal. Rptr. 819, 464 P.2d 483, as clothing the defendant with First Amendment protection from prosecution under California's common pandering statute. Yet a unanimous court of our own District in *Fixler* cites *Barrows* as authority for a different principle of law, stating: "The California Supreme Court held in *Barrows v. Municipal Court* ..., that acts which are independently prohibited by law cannot be consum-

mated without sanction merely because they occur in a theatrical setting and we conclude they cannot be consummated without sanction because they occur in the course of preparing material which may ultimately be exhibited in a manner protected by the Constitution. [Citations.]" (*People v. Fixler, supra*, 56 Cal.App.3d at p. 326, 128 Cal.Rptr. 363.)

"The prosecution [for violating section 266i] here was based on conduct and was not aimed at prohibiting any communication of ideas. The manner of obtaining the photographs and the ultimate use to which those photographs might be put are separate and unrelated issues. While First Amendment considerations may protect the dissemination of printed or photographic material regardless of the manner in which the material was originally obtained, where a crime is committed in obtaining the material, the protection afforded its dissemination would not be a shield against prosecution for the crime committed in obtaining it." (*People v. Fixler, supra*, 56 Cal. App.3d at pp. 325–326, 128 Cal.Rptr. 363.)

The Supreme Court's majority decision in

Barrows, supra, was directed to interpreting Penal Code sections 647, subdivision (a), and 311.6, in the context of live theatrical performances. I do not view *Barrows* so broadly as to afford the cloak of First Amendment protection to actual illegal prostitution activities. In my judgment, the procurement for money of models to perform the acts involved in the case before us clearly falls within the ambit of section 266i.

McCLOSKY, Associate Justice, dissenting.

I respectfully dissent.

In *Burton v. Municipal Court* (1968) 68 Cal.2d 684, 689, 68 Cal.Rptr. 721, 441 P.2d 281, our Supreme Court, citing *Joseph Burstyn, Inc. v. Wilson* (1952) 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, concluded that "[i]t can no longer be questioned that expression by means of motion pictures is included within the free speech and press guarantees of the First and Fourteenth Amendments."

Barrows v. Municipal Court (1970) 1

Cal.3d 821, 830–831, 83 Cal.Rptr. 819, 464 P.2d 483, was a case in which two actors of a play entitled "The Beard," allegedly involving lewd conduct and speaking obscene words, were charged with violating Penal Code sections 647, subdivision (a) and 311.6, for the performance of the lewd conduct and the utterance of those words. The play's producer and director were charged with wilfully and unlawfully aiding and abetting them in committing those violations. All four defendants petitioned for a writ of prohibition to restrain the respondent court from proceeding to trial. The California Supreme Court reversed the trial court's denial of the writ with directions to issue the writ of prohibition as prayed for.

In doing so, the *Barrows* court first explained that it began "with the premise that live plays performed in a theater before an audience are entitled to the same protection under the First Amendment as motion pictures...." (1 Cal.3d at p. 824, 83 Cal.Rptr. 819, 464 P.2d 483.) It concluded that "such [theatrical] performances do not fall within the purview of [the vagrancy law] section 647, subdivision (a)." (*Id.*,

at p. 829, 83 Cal.Rptr. 819, 464 P.2d 483.) It also held that "the conclusion is inescapable under these circumstances that theatrical performances are not included within the prohibition of [Penal Code] section 311.-6." (*Id.*, at p. 830, 83 Cal.Rptr. 819, 464 P.2d 483, fn. omitted.)

The *Barrows* court went on to explain:

"Our holding here does not suggest that acts which are independently prohibited by law may be consummated without sanction on the stage merely because they occur during the course of a theatrical play. Dramatic license would not supply indulgence for the actual murder of the villain, the rape of the heroine, or the maiming of the hero. Neither do we intend to imply, however, that conduct or speech in a theatrical production is to be judged by the same standards as conduct or speech occurring on the street or other public place. *Giannini* [*In re Giannini* (1968) 69 Cal.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535] makes it clear that 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the

protection of the First Amendment, losing that protection only if found to be obscene.' (69 Cal.2d at p. 572 [72 Cal.Rptr. 655, 446 P.2d 535].) We particularly reaffirm this portion of the decision in *Giannini*, for any more restrictive rule could annihilate in a stroke much of the modern theater and cinema. The loss to culture and to First Amendment rights would be equally tragic." (1 Cal.3d at pp. 830–831, 83 Cal.Rptr. 819, 464 P.2d 483.)

While the motion picture "Caught From Behind, Part II" may be of little value to our culture, the record does not reflect that petitioner has been charged with or found to have violated any obscenity law. I cannot conclude that the purpose of the Legislature in enacting Penal Code section 266i was to prevent the production or distribution of theatrical plays or motion pictures depicting sex acts between consenting adults. Had it wished to do so the Legislature could have added the production of such plays or films to the list of proscribed acts and conduct listed in that section. It did not do so. It is not our right to interpret a criminal statute broadly to aid a

finding of guilt, especially where to do so invades a First Amendment protection. It is plain to me that the defendant's purpose here was to profit from making a motion picture and not "to procure a person, or attempt to procure a person, for the purpose of prostitution" within the meaning of Penal Code section 266i.

The concurring opinion relies in large measure on *People v. Fixler* (1976) 56 Cal. App.3d 321, 324, 326, 128 Cal.Rptr. 363, to limit the holding of *Barrows*. *Fixler* involved "essentially ... the use of ... a 14 year old girl who was hired ... to perform ... in return for money ..." depraved and perverted sex acts which were photographed and were allegedly to be published in a magazine. The difficulty with taking that position is that *Fixler* focuses on only one part of the *Barrows* formulation in quoting *Barrows* as stating "'that acts which are independently prohibited by law cannot be consummated without sanction merely because they occur in a theatrical setting and we conclude they cannot be consummated without sanction because they occur in the course of preparing mate-

rial which may ultimately be exhibited in a manner protected by the Constitution. [Citations.]' "

Neither *Fixler* nor the lead or concurring opinions deal with the equally important language in *Barrows* that states "[n]either do we intend to imply, however, that conduct or speech in a theatrical production is to be judged by the same standards as conduct or speech occurring on the street or other public place" and goes on to cite *In re Giannini, supra*, 69 Cal.App.2d 563, 72 Cal.Rptr. 655, 446 P.2d 535, for the proposition that " 'acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene.' (69 Cal.App.2d at p. 572 [72 Cal.Rptr. 655, 446 P.2d 535].) We particularly reaffirm this portion of the decision in *Giannini*, for any more restrictive rule could annihilate in a stroke much of the modern theatre and cinema. The loss to culture and to First Amendment rights would be equally tragic." (1 Cal.3d at pp.

830, 831, 83 Cal.Rptr. 819, 464 P.2d 483.)

I don't think *Barrows* can be discussed fairly without considering its entire holding. More importantly, I don't see how we can be obedient to the principle of stare decisis if we disregard an important part of the Supreme Court's holding in *Barrows*. The *Barrows* court recognized that such serious crimes as murder, rape and maiming are excluded from the protection of the First Amendment but reaffirmed the portion of *Giannini* that held that "acts which are unlawful in a different context, circumstance, or place, may be depicted or incorporated in a stage or screen presentation and come within the protection of the First Amendment, losing that protection only if found to be obscene." (69 Cal.App.2d at p. 572, 72 Cal.Rptr. 655, 446 P.2d 535.)

In his dissent in *Barrows*, Justice Burke expressed his view that the effect of the holding in that case "is to allow acts, however obscene, to be performed on the stage with complete immunity unless they are proscribed by other statutory provisions." (1 Cal.3d at p. 831, 83 Cal.Rptr. 819, 464

P.2d 483.) Even if that be so, *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 20 Cal.Rptr. 321, 369 P.2d 937, makes clear that it is not the prerogative of an intermediate court to attempt to overrule a majority opinion of the Supreme Court. *Auto Equity Sales* requires us to follow the rule of *Barrows*. I therefore cannot concur in either the lead or concurring opinion.

I think also that the import of *Barrows* forecloses the distinction the lead opinion attempts to draw between the *production* of the motion picture and its *distribution*, attempting to afford the protection of the amendment to the distribution while withholding its protection from the production. *Barrows* makes no such distinction. In that case the Supreme Court held that the producer's petition for the writ of prohibition should have been granted along with that of the director and actors. It is true that the producer and director in *Barrows* were charged only with aiding and abetting the actors in committing the violations, but the principle is the same and reflects the

truth that the production of a motion picture is but an integral step from the conception of the idea of a film or a play to its viewing by an audience. It is obvious that the strictures of the First Amendment may be just as effectively violated by penalizing production as by penalizing distribution or viewing.

I would, therefore, reverse.

APPENDIX C

OPINION OF COURT OF APPEAL IN PEOPLE V. HAROLD FREEMAN 234 CAL. RPTR 245 (FEB. 2, 1987), RE PENALTY SET FORTH IN PENAL CODE SECTION 266(i).

Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 3).

The PEOPLE, Plaintiff and Appellant,

v.

Robert Harold FREEMAN, Defendant and Respondent.

B016295.

Court of Appeal, Second District, Division 4.

Feb. 2, 1987.

Review Granted April 16, 1987.

Defendant was convicted in the Superior Court, Los Angeles County, James A. Albracht, J., of pandering. Defendant appealed. The Court of Appeal, affirmed conviction. On remand, the Superior Court sentenced defendant to five years probation and assessed fine. People appealed. The Court of Appeal, Kingsley, Acting P.J., held that three-year prison sentence for violation of pandering statute would constitute "cruel and unusual punishment."

Affirmed.

McClosky, J., concurred and filed opinion.

Arguelles, J., dissented and filed opinion.

Criminal Law ⇐1213.8(3)

Three-year prison sentence for violation of pandering statute by employment of actors and actresses to appear in pornographic motion picture would constitute "cruel and unusual punishment," where pandering would be treated like armed robbery, and danger posed to public by crime was minimal. West's Ann.Cal.Penal Code §§ 266i, 1203.065, 1203.065(a); U.S.C.A. Const.Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

Ira Reiner, Dist. Atty. of Los Angeles County, Donald J. Kaplan, Eugene D. Tavris, and Dirk L. Hudson, Deputy Dist. Attys., for plaintiff and appellant.

Stuart Goldfarb, Beverly Hills, for defendant and respondent.

KINGSLEY, Acting Presiding Justice.

By an opinion filed January 6 of this year, we affirmed the defendant's conviction for a violation of the pandering statute, Penal Code section 266i. (*People v. Freeman* (Jan. 6, 1987, B015697). In that opinion, we held that the defendant had violated this statute by his employment of actors and actresses to appear in a pornographic motion picture. Penal Code section 266i states that conviction under this statute is punishable by imprisonment for a period of three, four, or six years. In addition, Penal Code section 1203.065 forbids the court to grant probation or suspend the sentence of a defendant found guilty of violating that section.[1] Following

1. Penal Code section 1203.065, subdivision (a), provides: "Notwithstanding any other provision of law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, any person convicted of violating subdivision (2) of Section 261, or Section 264.1, or Section 266h, or Section 266i, or Section 266j, or 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person or subdivision (c) of Section 311.4."

the defendant's conviction, however, the trial court sentenced the defendant to five years probation, with the first 90 days to be served in county jail, and assessed the defendant the maximum restitutionary fine of $10,000. The court declined to sentence the defendant to the mandatory minimum three-year prison term required by Penal Code section 1203.065, ruling that the application of that statute to the facts of this case would constitute cruel and unusual punishment.

The People have appealed from that order. They cite the recent opinion in *People v. O'Connor* (1987) 188 Cal.App.3d 645, 233 Cal.Rptr. 529 and *People v. Jeffers* (1987) 188 Cal.App.3d 840, 233 Cal.Rptr. 692 for the proposition that the pandering statute does not impose inherently cruel and unusual punishment. With this we agree. We see nothing in that opinion, however, that limits a trial court's discretion to determine that a sentence is disproportionate to a defendant's individual culpability, as the trial court did here. (*People v. Dillon* (1983) 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.2d 697.)

In *In re Lynch* (1972) 8 Cal.3d 410, 425–429, 105 Cal.Rptr. 217, 503 P.2d 921, the Supreme Court identified a number of criteria useful in determining whether a particular sentence was so disproportionate to the crime as to constitute cruel and unusual punishment. These included considering both "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to the society" and comparing "the challenged penalty with the punishments prescribed in the *same jurisdiction* for *different offenses*...." (*In re Lynch, supra*, 8 Cal.3d at pp. 425–426, 105 Cal.Rptr. 217, 503 P.2d 921; emphasis in original.)

We note that defendant's mandatory sentence of three, four, or six years for hiring adult actors to appear in a pornographic film is the same the defendant would receive if he had committed an armed robbery.[2] In addition to carrying a penalty comparable to the most severe offenses,

---

2. Penal Code sections 211, 212.5, 213, 12022, subdivisions (a) and (b), and 1203.06, subdivision (a)(1)(iii).

the actual danger this crime poses to the public is minimal.[3] While there is undeniably a valid societal interest in preventing the exploitation of the naive actors and actresses who may have appeared in defendant's films, it is generally conceded that this interest is somewhat less than that involved in protecting the public from holdups. While we have no difficulty in holding that Penal Code section 1203.065 is constitutional, we conclude, as did the trial court, that the application of a minimum three-year prison sentence to the defendant in this case constitutes cruel and unusual punishment.

The order is affirmed.

---

3. The only danger that can plausibly be suggested is that it exploits those few gullible actors and actresses who entertain visions of stardom and who may be embarrassed later in life by their celluloid histories. Unlike the dissent, we fail to see how either of these evils would be eliminated by having the actors engage in simulated intercourse, or, for that matter, how they would be less exploited if they had performed the same acts on film, but had gone without pay—conduct which would not constitute pandering.

McCLOSKY, Associate Justice, concurring.

I reluctantly concur in the affirmance of the trial court's order of July 15, 1985. This appeal (*People v. Freeman* (B016295)) arises from an appeal by the People from the trial court's order of July 15, 1985, suspending proceedings and granting probation for five years on the conditions, among others, that the defendant spend the first 90 days in county jail and pay the maximum restitution fine of $10,000 pursuant to Government Code section 13967, subdivision (a).

In *People v. Freeman* (Jan. 6, 1987, B015697), I dissented from my colleagues' affirmance of the conviction of defendant for the violation of Penal Code section 266[1] in the production of the film "Caught From Behind, II." I did so based on my belief (1) that sound principles of stare decisis (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 20 Cal.Rptr. 321, 369 P.2d 937) compel us as an inferior

---

1. Unless otherwise expressly noted, all statutory references herein are to the Penal Code.

court to follow the majority opinion of the California Supreme Court in *Barrows v. Municipal Court* (1970) 1 Cal.3d 821, 83 Cal.Rptr. 819, 464 P.2d 483, and (2) that the First Amendment to the United States Constitution and article I, section 2 of the California Constitution, under the circumstances of this case, prohibit defendant's conviction for the crime of violating section 266i.

Having done so, I now find myself in the uncomfortable position of having to participate in the appellate review of the July 15, 1985, order of the trial court.

I start from the premise that there is nothing inherently unconstitutional in the provisions of section 1203.065, prohibiting the suspension of imposition of sentence and the grant of probation to any person properly convicted of violating section 266i. (See *People v. O'Connor* (1987) 188 Cal. App.3d 645, 233 Cal.Rptr. 529 and *People v. Jeffers* (1987) 188 Cal.App.3d 840, 233 Cal. Rptr. 692.)

In making its July 15, 1985, order the trial court held that "the sentence prescribed by law in this case, the mandatory

three years in State Prison, under the facts of this case, is cruel and unusual and grossly disproportionate to the offense committed, and to the offender, the defendant." *People v. Fixler* (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363, which involved unlawful acts with a 14 year old, is clearly distinguishable from the case at bench which involves only consenting adults performing lawful acts in a private residence, a place not open to the public.

In *People v. Dillon* (1983) 34 Cal.3d 441, 480, 194 Cal.Rptr. 390, 668 P.2d 697, the Supreme Court held that "... a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant's individual culpability."

I agree with Justice Kingsley that the application of section 1203.065, subdivision (a) to the defendant on the facts of this case would constitute cruel and unusual punishment and would be grossly disproportionate to the offense found by the majority to have been committed in case number B016295. I consequently concur that

given the affirmance in said case number B016295 that the sentence imposed should be affirmed.

ARGUELLES, Associate Justice, dissenting.

I respectfully dissent.

In 1976, this appellate district held that, "The purpose of the anti-pandering statute (Pen.Code, § 266i) is to '... cover all the various ramifications of the social evil of pandering and include them all in the definition of the crime, with a view of effectively combating the evil sought to be condemned.' [Citations.]" (*People v. Fixler* (1976) 56 Cal.App.3d 321, 327, 128 Cal.Rptr. 363.)

Engaging in the process of inductive reasoning to ascertain just what "evil" the anti-pandering statute seeks to condemn, we can trace that evil from the statute's language. "The term 'procure,' as it is used in the statute with relation to the crime of pandering, has a very definite and well understood meaning. A procurer is

one who exploits the virtue of a female by soliciting trade for a lewd and lascivious woman to gratify the lusts of other persons. A procurer is *an agent who promotes prostitution.* [Citations.] The result of soliciting patronage as the agent of a depraved woman is equally harmful to society whether the procurer carries on his loathsome trade with or without her consent." (*People v. Cimar* (1932) 127 Cal. App. 9, 13, 15 P.2d 166, emphasis added.)

As far as the Legislature and the courts are concerned, the evils of promoting prostitution did not change between the time *People v. Cimar, supra,* 127 Cal.App. 9, 15 P.2d 166, was decided and the time *People v. Fixler, supra,* 56 Cal.App.3d 321, 128 Cal.Rptr. 363, was decided 44 years later, just as the Legislature's three amendments to the anti-pandering statute in the 10 years that have passed since *Fixler* was decided have not specifically excepted still picture photographers or photo editors (or movie producers) from those who are subject to prosecution and conviction for pandering under the statute just because they are snapping pictures or rolling film.

While the "evil" to be condemned has not changed, the *form* of the promotion (of prostitution) and exploitation (of others' virtue for lustful gratification) *has* changed. When *Cimar* was decided, the "evil" usually took form in houses of prostitution (see Pen.Code, § 266i, subds. (c), (d)); as the court there concluded, "the legislature evidently intended to discourage the nefarious business of replenishing houses of prostitution with inmates." (*People v. Cimar*, *supra*, 127 Cal.App. at p. 14, 15 P.2d 166.) Now, however, the "evil" may also take the form of celluloid film or magnetic videotape of sex acts, performed for money, that can be played and replayed in movie theatres and on home video cassette players. I do not, however, believe that this change in form has changed the nature of the promotion and exploitation involved. One need look no further than count II here to see that the defendant promoted the prostitution of, and exploited, the owner of the residence where the filming occurred, a woman who had no acting experience and considered herself naive but had a desire or fantasy to be an "actress."

Defendant promoted the loss of, and exploited, her naivete in the gratification of others' lust through the medium of filmed sexual acts by employing her to engage in various sexual acts including intercourse before the camera, for which he paid her $200. Such on-location recruiting of neophytes is the same "nefarious business of replenishing," with respect to an industry which exploits the performance of sex acts for money, that the *Cimar* court found the Legislature intended to discourage with respect to houses of prostitution.[1] Then, as now, the person's consent is immaterial.

In the light of this review of the "evil" proscribed by the pandering statute, I am unpersuaded by the sentencing court's reasoning that the Legislature intended the statute to apply only to those connected

---

1. Defendant, as a purveyor of what he, himself, calls "filth" and "smut," was charged with pandering as to four other women who were veteran adult film "actresses" employed to engage in such sex acts as vaginal intercourse, oral copulation and anal intercourse before the cameras on the same film. By his own account, defendant has produced more than 100 full-length sex films since 1968.

with the urban blight, violence and squalor of "street" pandering when the court refused to impose the prescribed minimum three-year sentence without probation (Pen. Code, § 1203.065, subd. (a)) as cruel and unusual as applied here, pursuant to *People v. Dillon* (1983) 34 Cal.3d 441, 194 Cal.Rptr. 390, 668 P.2d 697. If it were only "force, violence, threats," victimization of neighborhoods, engendering of "street crime, litter or the repulsive specter [sic] of prostitutes soliciting people walking down the street in front of innocent citizens and school children in decent neighborhoods" that made pandering pernicious enough to warrant a state prison sentence, as reasoned by the sentencing judge here, then certainly that commercially successful class of prostitution sometimes referred as "out-call" and operated like, or more often under the guise of, an escort service must also be exempt from the minimum three-year state prison sentence of the anti-pandering statute. Is the defendant here, holding himself out as a legitimate movie producer, so unlike a panderer of "out-call" prostitution of the type described by the

recently-publicized "Mayflower Madam"? Is the nature of the exploitation of virtue and promotion of prostitution significantly different as between "out-call" prostitution panderers and "streetwalker" prostitution panderers so that a lenient three-month jail term is justified in the former while a mandatory three-year prison term is statutorily required in the latter? Not only do I not think so, but I do not believe the Legislature thinks so either.

This is not to say that panderers who employ force, violence, threats, drugs and any manner of vile and despicable coercive techniques of procuring are undeserving of more severe punishment than panderers who operate out of penthouse office suites without using such techniques. That is the very reason why the statute provides alternative sentences of three, four, or six years. That is the proportionality that should have been applied here—the very proportionality provided by the Legislature within the statute and left intact by it even after *People v. Fixler*, *supra*, 56 Cal. App.3d 321, 128 Cal.Rptr. 363 was decided.

As for the concern that state prison sentences will have a chilling effect on constitutionally protected creative expression in the theatre or film industries, that concern can only come from the mercenary voices of those who profit by the kind of exploitation involved here. If people performing sex acts before cameras are truly "actors" and "actresses," then let them *act*. Sex has been simulated effectively in the theatre and on the screen for years, just as violence and death have. But prostitution and pandering are not entitled to legal protection or less severe punishment just because such crimes are committed for an "adult sex film," just as murder deserves no protection or mitigated punishment when committed for a so-called "snuff film."

For these reasons, I would reverse the sentence and remand the matter for resentencing in a manner consistent with the views I have expressed.

APPENDIX D

COPY OF PETITIONER KAREN APPLEGATE AND PHIL APPLEGATES' "MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING BY RESPONDENT PURSUANT TO RULE 27(b); OR IN SUPPORT OF A HEARING GRANTED ON THE COURT'S OWN MOTION BEFORE THE DECISION BECOMES FINAL PURSUANT TO RULE 27 (a); WITH BRIEF AMICUS CURIAE ANNEXED", LODGED WITH THE CLERK OF THE CALIFORNIA SUPREME COURT ON SEPT. 9, 1988, AND FILED BY THE CALIFORNIA SUPREME COURT ON SEPTEMBER 14, 1988.

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari at pages 3, 32, 35, 42, and 44).

S000070

2 CRIM. B015697

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	RECEIVED
	)	88 SEP 9 P 4:02
Plaintiff and Respondent,	)	
v	)	SUPREME COURT LOS ANGELES
HAROLD FREEMAN,	)	
Defendant and Appellant.	)	

APPEAL FROM THE SUPERIOR COURT

OF LOS ANGELES COUNTY

HONORABLE JAMES A. ALBRACHT, JUDGE

Motion For Leave To File Brief Amicus Curiae In Support Of Petition For Rehearing By Respondent Pursuant To Rule 27(b); Or In Support Of A Hearing Granted On The Court's Own Motion Before The Decision Becomes Final Pursuant To Rule 27(a); With Brief Amicus Curiae Annexed.

S000070

2 CRIM. B015697

IN THE SUPREME COURT OF

THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	)
v.	)
HAROLD FREEMAN,	)
Defendant and Appellant.	)

APPEAL FROM THE SUPERIOR COURT

OF LOS ANGELES COUNTY

HONORABLE JAMES A ALBRACHT, JUDGE

MOTION

To The Honorable Malcolm M. Lucas, Chief Justice, And To The Honorable Associate Justices Of The Supreme Court Of The State Of California:

Phil Applegate and Karen Applegate, the parents of the late Colleen

Applegate, also known as "Shauna Grant", move for leave to file a brief amicus curiae pursuant to Rule 14(b), in support of a Petition for Rehearing by the Respondent, pursuant to Rule 27(b) or, alternatively, in support of a Rehearing Granted By the Court on its own motion before the decision becomes final, pursuant to Rule 27(a).

Interest of Amicus Curiae

Phil Applegate and Karen Applegate, parents of Colleen Applegate, who performed in at least 29 hard-core pornographic films under the name "Shauna Grant", contend that, if permitted to stand, the decision of the California Supreme Court, filed August 25, 1988, will perpetuate the type of harm suffered by Colleen and the Applegate family as a result of the sexual conduct which this decision tolerates. The "World Modeling Agency

operated by Jim South", referred to in this Court's opinion (see 88 Daily Journal, DAR 11013 at 11014), is identified in the P.B.S. documentary on Colleen, "Death of a Porn Queen" as the very agency that "seduced" Colleen Applegate at age 18, and started her on the road to her death from a self-inflicted gunshot wound at age 20. A copy of the P.B.S. documentary is filed with this Court as Exhibit 6 to this motion.

The harm to the Applegate family did not end with Colleen's death in 1984. The producers of such films are presently broadcasting her hard-core films to the world on Satellite Television and are selling them in videotape form at neighborhood videotape stores throughout the United States. It is a well known fact that almost all of such films are produced in the State of

California. Their very existence is dependent, to a large degree, upon the "largesse" of the California Judicial system. It is generally recognized that were Freeman's conviction affirmed, that business "production" would vanish overnight.

Phil Applegate and Karen Applegate want to end the continuing hurt and degredation suffered by the Applegate family. Toward that end, on July 7, 1988, they filed a "Motion for Leave to File a Brief Amicus Curiae in the Supreme Court of the United States" in Fort Wayne Books, Inc. v. State of Indiana, No. 87-470, which is calendared for oral argument on October 3, 1988, asking that the Civil RICO Statutes be upheld as applied to such hard-core pornographic trade. In support of that motion, they, as the moving party, have lodged six exhibits with the U.S.

Supreme Court as a part of their "Brandeis" motion, as a background to the constitutional issues which are being addressed in that case. A copy of that motion and four of the six exhibits is concurrently being filed with this Court as Exhibits 1-5 to this brief and for the same reason:

> 1A, 1B. Two video tapes of the Satellite broadcast of S-1 Channel 18 on March 12, 1988, including the Colleen Applegate film "Suzie Superstar", as surveilled in Niagara County, New York.
>
> 2A, 2B. Two video tapes of the Satellite broadcast of S-1 Channel 18 on March 13, 1988, including the Colleen Appelgate film "Glitter", as surveilled in Niagara County, New York.
>
> 3. A-C. Three volumes of time and motion studies of 29 copyrighted, hard-core pornographic films in which Colleen Applegate appeared.
>
> 4. Video tape copy of P.B.S. Documentary, "Death of a Porn Queen", reporting on the background and death of Colleen Applegate at age 20.

5. Motion For Leave To File Brief Amicus Curiae, etc. in Fort Wayne Books, Inc. v. State of Indiana, No. 87-476.

6. Time and Motion Study of the film, "Caught from Behind II".

POINTS REQUIRING FURTHER ARGUMENT

Moving Parties contend that the opinion of this Court, filed on August 25, 1988, contains the following fundamental errors:

1. The opinion erroneously "assumes" that the film "Caught from Behind II" is not obscene. See opinion in 88 Daily Journal D.A.R. 11013 at 11013 reading:

> "Defendant Harold Freeman hired and paid actors to perform in a non obscene commercial film which portrayed sexually explicit acts. . ." (our emphasis.)

and at 11015 reading:

> "Since the acts involved here have not been adjudged obscene, they are within the protection of the First Amendment."

Moving Parties have attached a time and

motion study of the film "Caught from Behind II" as Exhibit 6 to this motion. A casual examination of this autoptical evidence clearly establishes beyond all doubt that the film is obscene as a matter of law and "contraband" under Federal law in that "reasonable minds would not differ and all reasonable persons would conclude that the film is "hard-core" pornography. See Zeitlin v. Arnebergh, 59 Cal.2d 901, 31 Cal.Rptr. 800 (1983); U.S. v. 37 Photographs, 402 U.S. 363 at 377. Moving Parties submit that the opening statement of the Court's opinion that "Defendant Harold Freeman hired and paid actors to perform in a non obscene commercial film" (our emphasis), is so contrary to the autoptical evidence which is before this Court as to place in question the "honesty" of everything thereafter in the opinion, which is argued in support

of the Court's analysis. More succinctly, the "straw man", which the opening sentence attempts to create, falls apart when analyzed alongside the autoptical evidence in Exhibit 6 to this motion (time and motion study of "Caught from Behind II").

2. The Court erred in accepting the People's erroneous concession that the film in this case was not obscene. See Opinion in 88 Daily Journal D.A.R. 11013 at 11015 reading:

> "The fact that the People concede that a film identical to that in this case could be made lawfully if the performers were not paid also belies the asserted 'public health' issue."

This Court has a duty and obligation to make a moral judgment on the film which is before it, "Caught from Behind II". If this Court fails to so act, the result will be that other "talent agencies" will use this film and case as a bell weather and will openly demand

this type of sexual conduct from young actors and actresses, multiplying the harm that has been done in the past to persons like Colleen Applegate and Linda "Lovelace" Marciano by the criminal conspirators who are presently before this Court.

3. In overruling People v. Fixler, 56 Cal.App.3d 321, decided 12 years ago, and other cases which would mandate an affirmance of Freeman's conviction (see opinion at footnote 6), this Court improperly disregarded a fundamental rule of statutory construction (see Sutherland, Statutory Construction, Vol. 2a at §49.05 "Official Interpretation" and Vol. 3a at page 186, et seq. "Prior Construction"). See also Justice Arguella's statement in the Court of Appeal below, People v. Freeman, 233 Cal.Rptr 510 at 511:

> " People v. Fixler (1976) 56 Cal.App.3d 321, 128 Cal.Rptr. 363,

> and People ex rel. Van de Kamp v. American Art Enterprises, Inc. (1977) 75 Cal.App.3d 523, 529, 142 Cal.Rptr. 338, have unequivocally held that sexual intercourse for hire by models whose activity is photographed for publication is prostitution. Fixler specifically approved the use of Penal Code section 266i to prosecute a photographer and a photo editor of a pornographic firm for the hiring of a young female, for photographic purposes, to engage in lewd acts and sexual intercourse with another male. There is no essential difference between the taking of still photographs for publications and filming for the production of motion pictures."

4. The Court's opinion in 88 Daily Journal D.A.R. 11013 at 11016 is in error, where it concludes:

> ". . . the acts of alleged "prostitution" in this case were not crimes independent of and apart from payment for the right to photograph the performance. The determination that pandering and prostitution occurred here was entirely dependent on the payment for the right to photograph. When considered aside from the payment of the acting fees, itself fully lawful otherwise, the sexual acts depicted in the motion picture here were completely lawful. the sexual conduct was between consenting adults and occurred in a place not open to the public. . . ." (Our

emphasis.)

The sexual acts depicted were not lawful. It is within the prerogative of the State Legislature to apply the pandering statutes to the conduct of individuals who meet in secret and conspire to film in two dimension form for commercial distribution and exhibition, that type of sexual conduct which is regarded as "lewd conduct" and against public policy when commercially exhibited in three dimension form. This is what People v. Fixler, 56 Cal.App.3d 321 "unequivocally" held, and was a correct statement of constitutional law. See the analysis and clear logic of Associate Justice Burke, speaking for the New York Court of Appeals in Trans Lux Dist. Corp. v. Board of Regents 248 N.Y.S.2d 857 (1964) and Justice Arguellas speaking in the court below in People v. Freeman 233 Cal.Rptr. 510 at

511.

5. The opinion fails to recognize that the sex acts being performed for Freeman provided independant evidence of at least three kinds of criminal conduct: (1) lewd conduct in public; (2) overt acts establishing a conspiracy to perform lewd conduct in public; and (3) overt acts establishing a conspiracy to produce and exhibit and distribute an obscene film. Since it is unlawful and against public policy to exhibit sex acts in public in three dimension, it is equally as unlawful and against public policy to film such acts and exhibit them on the public screen in two dimension. See Trans Lux Dist. Corp. v. Board of Regents, supra; U.S. v. Sandys, et al., 605 F.2d 210 (C.A. 6th, 1979) cert. denied in Gordon v. U.S. and Friedlander v. U.S., 444 U.S. 984 (Dec. 3, 1984). See Evans Theater Corp. et

al. v. Slaton, 180 S.E.2d 712, cited with approval by this Court in People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 42 at 54, 130 Cal.Rptr. 328 at 335 (1976).

6. The police power to punish lewd conduct in public is not subject to the limitations set forth in U.S. v. O'Brien, 391 U.S. 367. Nor does the film "Caught From Behind II" present this Court with either legislation or subject matter which is controlled by U.S. v. O'Brien, 391 U.S. 367. If "dung" is placed upon tissue paper, that "parchment" is not thereafter entitled to First Amendment Considerations.

7. The major defect in Justice Kaufman's reasoning is his conclusion that Producer Freeman can meet in secret at his house with his co-conspirators to make what he and the industry would regard as the most obscene films ever

produced, and that no criminal conduct would occur until the obscene motion picture film had been completed.

ARGUMENT

I

The Performance Of Patently Offensive Representations Of Ultimate Sexual Acts, Actual or Simulated, In Public, Whether Real Or Simulated, Live Or As Part Of A Motion Picture Film, Or Video Tape, Such As "CAUGHT FROM BEHIND II", Or "DEEP THROAT", Or "SUZIE SUPERSTAR", Or "SHAUNA: EVERY MAN'S FANTASY", Or "GLITTER", Or "PRIVATE SCHOOL GIRLS", Is Obscene Per Se.

Where obscenity per se exists, no further evidence is necessary on that issue, inasmuch as the Court takes judicial notice of the fact that such finding is incontrovertible. In Mitchum v. State of Florida, 251 So. 2d 298 (Aug. 13, 1971), the Florida Court made the following comment on the application of judicial notice to material which was incontrovertibly obscene:

"Examination of appellants' argument. . . indicates that the real issue raised is the contention that the absence of testimonial evidence, . . renders the order of the lower court prejudicially erroneous and therefore reversible.

Long ago, it was held that in proper circumstances 'judicial notice' is superior to evidence since it fulfills the object which evidence is designed to fulfill and makes evidence on the point established by judicial notice unnecessary. Amos v. Moseley, 75 Fla. 555, 77 So. 619. It is designed as the cognizance of certain facts which judges and jurors may properly take and act upon without proof, because they already know them. United States v. Hammers, D.C., 241 F. 542. courts are presumed to know what everyone knows. 13 Fla. Jur., evidence section 14. Thus, the question resolves itself into whether the materials here involved are of such character as to establish circumstances whereunder the court may determine the obscenity question without evidence." (Emphasis ours.)

"We hold that the materials herein are 'hard-core pornography' and therefore within the rule announced in United States v. Wild, 422 F.2d 34 (2d Cir. 1970), cert. denied 402 U.S. 986, 91 S. Ct. 1644, 29 L.Ed. 2d 152, reh. den. 403 U.S. 940, 91 S. Ct. 2242, 29 L.Ed. 2d 720.

In United States v. Wild, supra, the

Court stated "We think that photographs an be so obscene -- it is conceivably possible that they be so obscene -- that the fact is incontrovertible. These photographs are such. . ."

In Morris v. U.S., 257 A. 2d 341 (Dec. 2, 1969), the Court voiced the following test for material which was "obscene per se", i.e., obscene as a matter of law:

> "Although the definition and elements of obscenity have been authoritatively stated in Roth and Memoirs, definition of the often-used terms 'hard-core obscenity' and 'obscenity per se' has been neglected by the Supreme Court. The Court of Special Appeals of Maryland has faced this problem before and has defined these terms in the following language: Hard-core pornography or obscenity per se is obscenity which 'focuses predominantly upon what is sexually morbid, grossly perverse and bizarre without any artistic or scientific purpose of justification.' There is no desire to portray (it) in pseudoscientific or 'arty' terms. It can be recognized by the insult it offers, invariably, to sex and to the human spirit. It goes substantially

> beyond customary limits of candor and deviates from society's standards of decency in the representation of the matters in which it deals. It has a patent absence of any redeeming social value; it speaks for itself and screams for all to hear that it is obscene. It is not designed to be a truthful description of the basic realities of life as the individual experiences them but its main purpose (is) to stimulate erotic response. . . No proof other than the viewing of it, is required to determine if it is, in fact, obscene. "It is clear to this court that where obscenity per se is involved, the prosecution is not required to offer any evidence (beyond the material or performance itself) that it is pornographic or obscene or that it is below the national community standards. Womack, supra, Hudson, supra. In other words, if reasonable men could not differ and they could come to but one conclusion, i.e., that the material or performance is sexually morbid, grossly perverse, and bizarre, without any artistic or scientific purpose or justification, then the Government on its case-in-chief need not offer any evidence of national community standards." (Our emphasis.)

In Boreta Enterprises, Inc., v. Dept. of Alcohol Beverage, 2 Cal. 3d 85, 84 Cal. Rptr. 113 at 123 (Feb. 26, 1970),

Justice Sullivan writing for a majority of the California Supreme Court, acknowleged that the conduct at issue could be so extreme as to properly conclude that the subject matter was "per se" contrary to public morals.

The performance of patently offensive representations of ultimate sexual acts, normal or perverted, actual or simulated, or of masturbation or lewd exhibition of the genitals in public, whether real or simulated, live or as a part of motion picture films is obscene per se. By far the best legal analysis on this point of law is that of Judge Burke speaking for the majority of the New York Court of Appeals in Trans-Lux Dist. Corp. v. Bd. of Regents. 248 NYS 2d 857 (1964) where he notes that "conduct" may actually be "speech", and what appears to be "speech" (films) may only be "conduct", at page 857:

"While typically applicable to 'speech' and 'press' in the forms known to the framers, the guarantee of the First Amendment has been read to include anything that is asserted to be someone's way of saying something. The most familiar instances of this application are physical conduct and motion pictures. (Thornhill v. Alabama, 310 U.S. 88, 60 S.Ct. 736, 84 L.Ed. 1093; Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S Ct. 777, 96 L. Ed. 1092, supra). Cases involving conduct as a form of expression have been frequent in labor law and provide a useful illustration of the transition from a somewhat doctrinaire application of the First Amendment (see e.g., Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, supra) to a realization that, while conduct may be speech, it still remains conduct and does not cease to present its unique problems of social control. It is now the law that even peaceful picketing may be forbidden where it violates State labor laws that are not themselves designed as restrictions on freedom of speech (Local Union No. 10, etc., Plumbers Union v. Graham, 345 conduct that is proscribed for valid public purposes is not immune merely because engaged in with a view to expression (Giboney v. Empire Ice & Storage Co., 336 U.S. 490, 69 S. Ct. 684, 93 L.Ed. 834). For example, in People v. Stover, 12 N.Y. 2d 462, 240 N.Y. S. 2d 734, 191 N.E. 2d 272, supra, app. dsmd. for want of a substantial Federal questions,

> 375 U.S. 42, 84 S. Ct. 147, 11 L.Ed. 2d 107, this court upheld an 'Aesthetic' ordinance prohibiting the display of soiled laundry on a clothesline in the defendants' front yard, despite the fact that the display was an expression of social protest.
>
> "Films, by their nature, may lie on either side of the division between speech and conduct. The opinions of the Supreme Court reversing this court in the cases of advocacy of adultery and thematic sacrilege make that plain. But it also follows that if 'picketing may include conduct other than speech, conduct which can be made the subject of restrictive legislation; (Giboney v. Empire Ice & Storage Co., supra, 336 U.S. p. 501, 60 S. Ct. p. 690, 93 L. Ed. 834) then so may films. In this regard, it will be noted that the Supreme Court has not yet expressed its opinion in a case involving allegedly obscene behavior on the screen. . ."

Judge Burke reasons that since there is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public, it must necessarily follow that the portrayal of

sexual intercourse on the screen for money was not "speech" and was merely unlawful sexual conduct; at page 860 et seq:

> "In Kingsley Intern. Pictures Corp. v. Regents, 360 U.S. 684, 79 S. Ct. 1362, 2 L.Ed. 2d 1512, the opinion of the court repeatedly distinguished between the right to communicate any idea, however deviant from orthodoxy, and 'the manner of its portrayal' (360 U.S. p. 688, 79 S. Ct. p. 1365, 3 L.Ed. 2d 1512). The 'freedom to advocate ideas' was protected, not any supposed right to behave lewdly in a public place. Even more to the point is the concurring opinion of Mr. Justice Clark who wrote: 'I see no grounds for confusion, however, were a statute to ban "pornographic" films, or those that "portray acts of sexual immorality, perversion of lewdness." If New York's statute had been so construed by its highest court, I believe it would have met the requirements of due process. Instead, it placed more emphasis on what the film teaches than on what it depicts. There is where the confusion enters.' (360 U.S. p. 702, 79 S. Ct. p. 1372, 3 L.Ed. 2d 1512; emphasis in original).
>
> "It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to state prohibitions as similar conduct if engaged in on the street. I believe the nature

of films is sufficiently different from books to justify the conclusion that the critical difference between advocacy and actual performance of the forbidden act is reached when simulated sexual intercourse is portrayed on the screen. I take it to be conceded that New York may constitutionally prohibit sexual intercourse in public. As Mr. Justice Douglas acknowledged, dissenting in Roth v. U.S. . . . . in contrasting books with conduct; 'I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe conduct on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct' (Emphasis in text).

"This observation is equally pertinent, of course, whether the sexual exhibitionism is done spontaneously in the street or in theaters for money (e.g., Penal Law, Consol. Laws, c. 40, Sections 43, 1140, 1140-a, 1140-b). There have been many cases dealing with what sort of behavior was covered by statutes against sexual exhibitionism and the like, but they were solely concerned with statutory interpretations, never, obviously, the First Amendment.

"This comparison between the acknowledged competence of the State to forbid public or semi-public sex displays and its power to exert similar control over similar conduct depicted on the

screen is not intended to imply any broad theory of legal equivalence between real conduct and a filmed imitation. Indeed, the meaningful comparison exists only in a narrow range of cases. In most instances, the real conduct is illegal because of what is accomplished by the person, as in murder, forgery, or adultery. In such cases, the filmed dramatization obviously does not share the evil aimed at in the law applicable to the real thing. Where, however, the real conduct is illegal, not because of what is accomplished by those involved, but simply because what is done is shocking, offensive to see, and generally believed destructive of the general level of morality, then a filmed simulation fully shares, it seems to me, the evil or the original. In such cases, the free expression protection of the First Amendment must apply to both or neither. It makes no sense at all to say that the conduct can be forbidden but not the play or film.

"The pattern of statutory regulation in New York aims at offensive -- more properly, obscene -- displays of conduct whether in the street (Penal Law Sections 43, 1140, 1140-b), on the stage (Penal Law, Sections 1140-a; People v. Vickers, 259 App. Div. 841, 19 N.Y.S. 2d 165 -- lewd dance) or on the screen (Penal Law Sections 1140-a, 1141; Education Law, Section 122). These laws care not about the communication of ideas (see Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L.Ed.

1117); they are aimed at certain narrow sorts of conduct. It seems to me, therefore, that if the defendants in People v. Stover, supra, could constitutionally be prohibited from selecting the forbidden form of conduct as the vehicle for the communication of their protest, then this petitioner cannot choose acted-out sexual intercourse as the vehicle for its art (see, also, People v. Vickers, supra, where a performer was prohibited from choosing a certain sort of dance as her vehicle, and the 'nude gymnasium' prohibited by Penal Law, Sections 1140-b). Numerous other instances also suggest themselves.

"If we can accept the obvious -- that sexual intercourse whether performed in the part or simulated on the stage or screen is in itself a form of conduct (in which the public have an interest), it is apparent that when this defendant chooses to use it as a vehicle for the expression of art it has 'brigaded' the communication (to the extent that it is 'communication') with conduct completely. In so doing the petitioner has subjected itself to such regulations as are appropriate to the conduct when engaged in for reasons having nothing to do with expression. There is otherwise no difference between advocacy and action. (Compare Thornhill v. Alabama, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093, with Local Union No. 10, etc., Plumbers Union v. Graham, 345 U.S. 192, 73 S. Ct. 585, 97 L.Ed. 946.) 'Freedom

> of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it' (Douglas J. dissenting in Roth v. United States, 354 U.S. 476, 514 77 S. Ct. 1305, 1324, 1 L.Ed. 2d 1498)."

The cogent point which Judge Burke so ably makes in Trans Lux Distributing Corp. v. Board of Regents, Supra, is that it is a non-sequitur to argue that one may present a filmed simulation of sexual intercourse because one may present a filmed dramatization of murder. There is no public policy which prohibits the portrayal of simulated murder. There is, however, a universally recognized right of the general public which is derived from the law of nature which prohibits the portrayal of sexual conduct in public, real or simulated. See Roth-Alberts, 345 U.S. 485, discussed hereinafter at Point IB. Judge Burke's closing

principle at page 863 is a fitting memorial which should be engraved upon the gravestone of that argument:

> "To all argument predicated on artistic merit as decisive of the constitutional question, it is sufficient answer to say that artists are not such favorites of the law that they may ply their craft in the teeth of a declared over-riding public policy against pornographic displays. Since no other profession is privileged to bend public morals, policy and law to its internal craft standards, then neither should producers of films."

The same "natural law" principle was voiced by the Georgia Supreme Court in its decision in Evans Theater Corp. et al. v. Slaton, 180 S. E. 2d 712 (Mar. 4, 1971) holding the motion picture film "I Am Curious (Yellow)" to be enjoinable as a public nuisance because of the sexual activity portrayed therein. In People ex rel. Busch v. Projection Room Theater, 17 Cal. 3d 42, 130 Cal. Rptr. 328 (June 1, 1976) the California

Supreme Court gave express approval to the above stated "natural law" principles expressed by the Georgia Supreme Court in Evans Theater Corp. et al. v. Slaton, supra.

I(B)

The Right of Society to Proscribe "Obscenity" In Motion Picture Films Is A "Natural Law" Right Which Has Its Roots In The Laws of Nature. Under Our Declaration of Independence and The Federal Constitution, That Right Is Inherent in State Government and Is Immutable.

The "right" of society to restrain obscenity in motion picture films is a "natural law" right which is derived from the laws of nature. In expressing the reason for proscribing obscenity in the form of the motion picture film "I Am Curious (Yellow)", the Georgia Supreme Court in Evans Theater Corp et al. v. Slaton, supra, deduced that right from "natural law" reasoning, at page 715:

> "The Criminal Code of Georgia makes penal a lewd performance in public, including an act of sexual intercourse and a lewd appearance in a state of nudity. Code Ann. Section 26-2001 (Ga. L. 1968, pp. 1249, 1301). Such acts are prohibited, not because of the injury inflicted on other individuals, as in the case of murder or robbery, but because the acts are offensive to the majority of the people. If any semblance of civilization is retained in our country, the States must have standards of conduct permissible in public. There is little difference in the effect on the public between lewd conduct in public areas and lewd conduct explicitly performed on a motion picture screen for the viewing of the public." (Our emphasis.)

In People ex rel Busch v. Projection Room Theater, 17 Cal 3d 42 at 54, 130 Cal Rptr 328 at 335 (1976), the California Supreme Court expressly agreed with the Georgia Supreme Court. It seems clear from the language used in the above opinion, namely: "If any semblance of civilization is retained in our country, the State must have standards of conduct permissible in

public" that both courts were talking about "natural law" rights which exists in all governments under the laws of nature, and were deducing from that principal the right of State government to so act.

This inherent "right" of society to restrain obscenity was before the United States Supreme Court in a challenge on first amendment grounds in Roth v. U.S. and Alberts v. California 345 U.S. 476 at 485. There, the High Court confirmed the existence of that natural law right by inductive reasoning from the past experience of all governments:

> "But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained, reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states, and in the 20 obscenity laws enacted by the Congress from 1842 to 1956." (Our

emphasis)

The "right" of a Community to abate grossly hard-core pornographic materials is a right which is rooted in the "Laws of Nature and of Nature's God" upon which our constitutional rights are based. See the language of Thomas Jefferson, speaking in the Declaration of Independence, appearing at Roth v. U.S. supra, that the right of organized society to proscribe obscenity is a "natural law" right inherent in all men in all societies. The Universal judgment which the majority of the U.S. Supreme Court described in Roth supra, is nothing less than the immutable laws of nature and the unalienable rights acknowledged by all great philosophers and common law judges from the dawn of Western Civilization and guaranteed to individuals by our federal constitution. See, for example: */ (*/ Edmund Burke

and the Natural Law, Peter J. Stanlis at App. 1)

> ca. 340 B.C., Aristotle: Political justice is partly natural, partly legal. Natural justice is that which everywhere has the same force and does not exist by people's thinking this or that (Ethics, v, 7) Particular law is that which each community lays down and applies to its own members.... Universal law is the law of nature. For there really is, as everyone to some extent divines, a natural justice and injustice which binds all men (Rhetoric, i, 13).
>
> ca. 54 B.C., Cicero: Right reason is indeed a true law which is in accordance with nature, applies to all men, and is unchangeable and eternal. By its commands this law summons men to the performance of their duties; by its prohibitions it restrains them from doing wrong. Its commands and prohibitions always influence good men, but are without effect upon the bad. To invalidate this law by human legislation is never morally right, nor is it permissible ever to restrict its operation, and to annul it wholly is impossible. Neither the senate nor the people can absolve us from our obligation to obey this law...It will not lay down one rule at Rome and another at Athens, nor will it be one rule today and another tomorrow. But there will be one law, eternal and unchangeable, binding at all times upon all people;and there will be,

as it were, one common master and ruler of men, namely God, who is the author of this law, its interpreter, and its sponsor. The man who will not obey it will abandon his better self, and, in denying the true nature of man, will thereby suffer the severest of penalties, though he has escaped all the other consequences which men all punishment (De republica, iii, 22).

533 A.D., Justinian: Natural laws which are observed among all nations are due to a divine providence. They remain in full force and are immutable (pandects, I,2).

ca. 1268, Henry de Bracton: The King himself ought not be subject to any man, but he ought to be subject to God and the law, since law makes the King. Therefore, let the King render to the law what the law has rendered to the King, vis, dominion and power, for there is no King where will rules and not the law (Tractatus de legibus, f. 5b).

1275, St. Thomas Aquinas: Since all things subject to Divine providence are ruled and measured by the eternal law...it is evident that all things partake somewhat of the eternal law, in so far as ...from its being imprinted on them, they derive their respective inclinations to their proper acts and ends. Now among all others, the rational creature is subject to Divine providence in the most

excellent way, in so far as it partakes of a share of providence, by being provident both for itself and for others...This participation of the eternal law in the rational creature is called the natural law...Every human law has just so much of the nature of law as it is derived from the law of nature. But if at any point it deflects from the law of nature, it is no longer a law but a perversion of law (Summa theologica, I, 2, Q. xci, art. 2; Q. xcv, art. 5).

1593, Richard Hooker: This (natural) law we may name Eternal, being that order which God, before all ages, has set down with Himself to do all things by...The (natural) laws...do bind men absolutely even as they are men, although they have never any settled fellowship, nor any solemn agreement among themselves what to do or not to do...Human laws are measures in respect of men whose motions they must direct...Such measures have also their higher rules to be measured by: which rules are two, the law of God and the Law of Nature. So that laws must be made according to the general law of nature (Of the Laws of Ecclesiastical Polity, I, ii, 6; I, x,i; III,9).

1608, Edward Coke: The Law of Nature was before any judicial or municipal law and is immutable. The law of Nature is that which God at the time of the creation of nature of man infused into his

heart for his preservation and direction; and this is the Eternal Law, the Moral Law, called also the Law of Nature (Calvin's Case, note 7, Rep. 12a).

1612, Francis Suarez: The rational basis of the Law of Nations....consists in the fact that the human race, howsoever many the various peoples and kingdoms into which it may be divided, always preserves a certain unity, not only as a species, but also, as it were, a moral and political unity called for by the natural precept of mutual love and mercy, which applies to all...For just as in one state of province law is introduced by custom, so in the human race as a whole, it was possible for laws to be introduced by the habitual conduct of nations, and all the more because the matters comprised within this latter system of law are few and very closely related to the Natural Law, and most easily deduced therefrom in a manner so advantageous and so in harmony with nature itself, that while this derivation of the law of nations from Natural Law may not be self-evident, that is, not essentially and absolutely required for moral rectitude, it is nevertheless quite in accord with nature and universally acceptable for its own sake (De legibus ac de Deo legislatore, Vol. II, Chap. xix).

1625, Hugo Grotius: The Natural Law is the dictate of right reason which points out that a given act,

because of its opposition to or conformity with man's rational nature, is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the Author of nature...Many human laws may be established supplementing the Natural Law, but they cannot contradict it (De jure belli et pacis, I,i,10).

1672, Samuel Pufendorf: We may call it (Natural Law) likewise that law Universal or Perpetual, the former, in regard that it binds the whole Body of the Human Race, the latter, because it is not subject to change (Of the Law of Nature and Nations, Oxford ed. (Oxford, 1703), p. 95).

1690, John Locke: Municipal laws are only so far right as they are founded on the law of Nature, by which they are to be regulated and interpreted (Second Treatise on Civil Government, chap. 1 sec. 12).

1758, Emmerich de Vattel: As men are subject to the laws of nature and as their union in civil society cannot exempt them from the obligation of observing those laws...the whole nation remains subject to the laws of nature and is bound to respect them in all its undertakings (Le droit des gens, Int.5).

1765, William Blackstone: This law of nature, being coeval with mankind, and dictated by God himself, is of course superior in

> obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original (Commentaries on the Laws of England, Chitty ed. (New York, 1832), I, 27-28).
>
> 1776, Thomas Jefferson: When in the Course of human events, it becomes necessary for one people to dissolve the political bands, which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind require that they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights that among these are Life, Liberty and the pursuit of Happiness (The Declaration of Independence, p.1).

CONCLUSION

A rehearing should be ordered and the judgment of conviction below should be affirmed upon the natural law principles urged hereinabove.

Date: September 9, 1988

Respectfully Submitted,

/s/James J. Clancy

JAMES J. CLANCY
Attorney for Moving Parties and
Amicus Curiae Phil Applegate and
Karen Applegate

STATE OF CALIFORNIA)
) SS. PROOF OF
) SERVICE BY MAIL
COUNTY OF LOS ANGELES)

I, JAMES J. CLANCY, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the within entitled action. My business address is 9055 La Tuna Canyon Road, Sun Valley, California 91352. On September 9, 1988, I served a true copy of :

Motion For Leave To File Brief Amicus Curiae In Support Of Petition For Rehearing By Respondent Pursuant To Rule 27 (b); Or In Support Of A Hearing Granted On The Court's Own Motion Before The Decision Becomes Final Pursuant

To Rule 27(a); With Brief Amicus Curiae Annexed.

on the Parties herein by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Sun Valley, California, Addressed as follows:

Mr. Dennis A Fischer
1448 15th Street, Suite 100
Santa Monica, California 90404

Lauren E. Dana
Office of the Attorney General
3580 Wilshire Boulevard, Room 800
Los Angeles, California 90010

I declare that I am a member of the Bar of this Court and the person making this service.

I certify under penalty of perjury that the foregoing is true and correct.

Executed on September 9, 1988, at Sun Valley, California.

/s/ James J. Clancy
JAMES J. CLANCY

APPENDIX E

COPY OF ORDER OF CALIFORNIA SUPREME COURT, FILED OCTOBER 20, 1988, DENYING PETITIONERS' MOTION FOR THE CALIFORNIA SUPREME COURT TO GRANT A REHEARING ON ITS OWN MOTION.

(Reference: Motion For Leave To Intervene and Petition for Writ Of Certiorari, at pages 5 and 36).

E-1

No. S000070

IN THE

SUPREME COURT OF THE

STATE OF CALIFORNIA

IN BANK

Supreme Court
FILED
Oct. 20, 1988
DW Clerk
DEPUTY

PEOPLE, Respondent,

v.

HAROLD FREEMAN, Appellant,

ARGUELLES, J., DID NOT PARTICIPATE.

The motion for this court to grant a rehearing on its own motion, filed September 14, 1988, is DENIED.

Lucas

Chief Justice

APPENDIX F

COPY OF REMITTITUR OF THE CALIFORNIA SUPREME COURT, FILED OCTOBER 21, 1988

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 4).

IN THE

SUPREME COURT OF THE

STATE OF CALIFORNIA

REMITTITUR

To the	) Supreme Court No. S000070
Court of Appeal,	)
	) Court of Appeal No. B015697
THE PEOPLE,	)
Respondent,	) County Los Angeles
	)
	) Superior Court No. A805936
vs.	)
	)
HAROLD FREEMAN,	)
	)
Appellant.	)
	)
	)

I, JOHN C. ROSSI, Acting Clerk of the Supreme Court of the State of California, do hereby certify that the attached are copies of the original judgment now final, entered in the above-entitled cause on the 25th day of August, 1988.

Costs, if any, shall be taxed by the Court of Appeal.

WITNESS my hand and
the seal of the Court,
this 21st day of
October, 1988.

JOHN C. ROSSI,
Acting Clerk

By Bessie Wong
Deputy

Enclosures: 2 certified copies of opinion
2 remittiturs
1 receipt

APPENDIX G

COPY OF "MOTION TO AFFIRM" FILED BY APPELLEE OHIO EX REL CHARLES H. KEATING JR. IN 1973 IN A MOTION PICTURE ENTITLED "VIXEN" ET AL V. STATE OF OHIO EX REL CHARLES H. KEATING JR. 413 U.S. 905 (June 25, 1973) REQUESTING THAT THE JUDGMENT OF THE OHIO SUPREME COURT BELOW BE AFFIRMED, BASED UPON THE ANALYSIS OF ASSOCIATE JUSTICE BURKE IN TRANS LUX DIST. CORP. V. BOARD OF REGENTS OF THE UNIVERSITY OF NEW YORK.

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 23).

IN THE

Supreme Court of the United States

October Term, 1972
No. 71-599

A MOTION PICTURE FILM ENTITLED "VIXEN", RUSS MEYER, EVE PRODUCTIONS, INC., MALIBU INC., and CLARENCE P. GALL,

Appellants,

vs.

STATE OF OHIO, *ex rel.* CHARLES H. KEATING, JR.,

Appellee.

On Appeal From the Supreme Court of Ohio.

PETITION FOR REHEARING.

Petitioner, State of Ohio, *ex rel.* Charles H. Keating, Jr. prays that a rehearing be granted of this Court's decision of June 25, 1973, vacating the judgment of the Ohio Supreme Court in the above-entitled case. Petitioner further requests that said judgment of the Ohio Supreme Court be affirmed on the merits, upon the authority of this Court's recent rulings in *Miller v. California*, ... U.S. .... (June 21, 1973); *Paris Adult Theatre I v. Slaton*, ... U.S. .... (June 21, 1973); *Kaplan v. California*, ... U.S. .... (June 21, 1973); *United States v. 12-200 ft. Reels of Super 8 mm Film*, ... U.S. .... (June 21, 1973) and *United States v. Orito*, ... U.S. .... (June 21, 1973), and more precisely in accordance with the principles expressed in this Court's opinion in *United*

States v. 12-200 ft Reels of Super 8 mm Film, supra, at p. 7 fn. 7. In the latter case the majority gave authoritative judicial construction (*i.e.*, "judicial gloss") to the federal obscenity statutes, 19 U.S.C. Section 1305 (a) and 18 U.S.C. Section 1462 under this Court's "duty to authoritatively construe federal statutes where 'a serious doubt of constitutionality is raised' and 'a construction of the statute is fairly possible by which the question may be avoided,'" and implied that, were a state judicial system to adopt a similar approach and incorporate "specificity" *re* sexual conduct by way of judicial gloss on the state obscenity statute, no substantial federal question would thereafter be raised in applying such statute to given subject matter. If such is not the effect of this Court's decisions on June 21, 1973 then this Court is in a much bigger obscenity mess than that which flowed from the 1966 October Term reversals in *Redrup v. New York,* 386 U.S. 767 *et al.*

In the flurry of obscenity cases disposed of on June 21, 1973 and June 25, 1973, this Court overlooked the fact that, in the appeal herein, the Ohio judiciary had already construed the obscenity laws of the State of Ohio in a manner which rendered them specific, a factor which distinguishes the case herein from others on the 1972 October Term docket. See *City of Youngstown, Ohio v. Le Loreto,* 251 N.E.2d 491 at 500, 48 Ohio Op. 2d 393 (Sept. 10, 1969); *State of Ohio ex rel. Ewing v. Without a Stitch,* 57 Ohio Op. 2d 184 at the footnote on page 187 (July 9, 1971); Hamilton

County Common Pleas Judge Simon Leis' trial court opinion in *State of Ohio ex rel. Keating v. A Motion Picture Film Entitled "Vixen"*, unreported, but appearing in Appellant's Statement as to Jurisdiction at pages 13a-15a; and *State of Ohio ex rel. Keating v. Vixen*, 272 N.E.2d 137 at 141, 142, 27 Ohio St. 2d 278 (July 21, 1971). Further, the Ohio legislature had already enacted specific legislation of the type which was exemplified by this Court in *California v. Miller*, ... U.S. .... at slip opinion, pages 10-11 and which this Court wrote into the federal statutes as a federal standard in *United States v. 12-200 ft. Reels of Super 8 mm Film, supra.* See Ohio Revised Code Section 2905.34, *infra*, at page 11, and reproduced in Appellants' Statement as to Jurisdiction at Appendix pages 49a-50a. The opinion and judgment of the Ohio Supreme Court in *A Motion Picture Film Entitled "Vixen" et al. v. State of Ohio ex rel. Charles H. Keating, Jr.* was written with that obscenity history in the background.

The Ohio Judiciary, Through Decisional Law, Has Engrafted Specific Standards Onto the Term "Obscene" as Used in the Ohio Obscenity Laws.

The common standards of right and wrong embodied in the criminal statutes of Ohio dealing with sexual morality have, by judicial construction, been subsumed in the term "obscene" as used in the obscenity statutes. If such depictions are accompanied with the same "mens rea" which defines an offense under the criminal statutes, such also is in violation of the specific standards prescribed by the term "obscene". In *De Loreto*,

supra, the Court in examining several sex magazines on appeal, enumerated the state statutes and city ordinances which prohibited immoral conduct. From that the Court deduced what the moral standards of Ohio people on sex were, at page 500:

> *"The moral standards of the people in Ohio on sex are readily ascertainable because of the statutes that have been enacted on the subject. Youngstown has similar ordinances to the statutes of the state of Ohio.*
>
> "OHIO LAWS INDICATING SEX MORAL STANDARDS.
>
> "Laws of Ohio and the city of Youngstown relating to sex, which indicate the moral standards of the people of Ohio, prohibit the following:
>
> "1. Adultery or fornication. Section 2905.08, Revised Code. Youngstown City Ordinance 132.03.
>
> "2. Prostitution. Sections 2905.14 and 2905.-27, Revised Code. Youngstown City Ordinance Sections 132.01, 132.04 and 132.06.
>
> "3. Any person eighteen years of age or over wilfully making an indecent exposure of his person in a public place or in a place where there are other persons to be offended or annoyed thereby, or solicit another to engage in an act of sex perversion. Section 2905.30, Revised Code. Youngstown City Ordinance 132.11.
>
> "4. Any person eighteen years of age or over wilfully exposing his or her private parts in the presence of two or more persons of the opposite sex. "Private Parts" means the external genitalia of the human body. Section 2905.31, Revised Code.
>
> "5. Sodomy, Section 2905.44, Revised Code.

"MORAL STANDARDS OF OHIO PEOPLE ON SEX

"Thus, the laws of Ohio and the City of Youngstown prohibit extra-marital sexual relations, as offensive to the moral standards of the people of Ohio. Nudity to the extent of exposing the external genitalia of a male or female human body is also prohibited as likely to incite or encourage extra-marital sexual relations.

"We hold that one of the purposes of Section 2905.34, Revised Code, and of Youngstown City Ordinance Section 132.09(a), is directed at obscene publications that are likely to incite or encourage sexual conduct contrary to the moral standards of the people of Ohio." (Our emphasis.)

Hamilton County Common Pleas Judge Leis, in his trial court opinion herein in *Ohio ex rel. Keating v. Vixen,* dated November 17, 1969, applied the same rationale in his evaluation of the contemporary standards of the community (See Appellants' Statement as to Jurisdiction at p. 13a).

"The Court, under its prerogative to believe or disbelieve, or accept all or part, or none of the testimony and evidence presented, is of the opinion that such testimony does not reflect the true feeling and acceptability by the community of 'Vixen' type of film. First of all, acceptability by an audience is not the true criteria of the measurement of the community standard, and acceptance of a film by the community, because the attending audience is but a segment of the community, and I might say a very small segment of the Community.

"*A proper criteria for evaluation of the contemporary standard of the community is its establishment and enforcement of laws governing the conduct of its citizenry. A simple reference in the Ohio Revised Code sets forth the moral standards of the people of Ohio, including this community, on sex matters. These laws are enforced in this community, and include:*

Adultery or Fornication—Section 2905.08 O.R.C.
Prostitution—Section 2905.10 O.R.C.
Indecent Exposure—Section 2905.30 O.R.C.
Solicitation of Unnatural Sex Act—Section 2905.30 O.R.C.
Nudism—Section 2905.31 O.R.C.
Incest—Section 2905.07 O.R.C.
Rape—Section 2905.01 (etc.) O.R.C.
Sodomy—Section 2905.44 O.R.C.

"*These laws as well as local ordinances set forth the moral standard of the community,* and under proper presentation, they are enforced.

"In the case of Trans Lux Distributing Corp. vs. Board of Regents (248 NYS 2d 857), Judge Burke states 'It is my view that a filmed presentation of sexual intercourse, whether real or simulated, is just as subject to state prohibition as similar conduct if engaged in on the street.'

"The community does not allow, or condone, fornication on the street corner, or any public display of nakedness. Bare bosomed women are not permitted to walk the streets. If this happens, prosecution follows. *If the community does not accept (and permit) public display of sex* acts and

nakedness *on its streets and in public places, can it be said that a movie displaying such conduct meets the standards of the community? Definitely not.*" (Our emphasis.)

Lucas County Common Pleas Judge Nicholas J. Walinski arrived at the same result in his Findings of Fact and Conclusions of Law handed down in *State of Ohio ex rel. Ewing v. Without A Stitch,* on September 15, 1970:

"Finding of Fact . . .

"10. That acceptability by a movie audience is not the true criteria of the measurement of community standards relating to the representation of sexual matters or acceptance of a movie by the community because the attending audience, as in this case, is a very small segment of the community. *The proper criteria for a valuation of contemporary standards* of the community relating *to the representation of sexual matters must necessarily be the enacting and enforcement of laws by that community governing the conduct of citizenry; that simple reference to the Ohio Revised Code sets forth the legal moral standards of the people of Ohio, including Lucas County, on sex matters* and that there is generally attempted enforcement in this community. These Sections include, but are not limited to the following:

Sec. 2905.08 O.R.C., Adultery or Fornication
Sec. 2905.10 O.R.C., Prostitution
Sec. 2905.30 O.RC., Indecent Exposure
Sec. 2905.30 O.R.C., Solicitation of Unnatural Sex Act
Sec. 2905.31 O.R.C., Nudism
Sec. 2905.44 O.R.C., Sodomy

> There are existing similar statutes in the majority of states, giving an inference of national community standards." (Our emphasis.)

In affirming the decision of Judge Walinski, the Court of Appeals of Lucas County noted in *State ex rel. Ewing v. Without. A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971):

> "*We have also considered as indicative but not conclusive of national standards the laws of the State of Ohio* and other states.* See Roth, 354 U.S. at page 485."

As a footnote to that portion of the Court's opinion, the following appeared:

> *"*Among the laws of Ohio which are indicative are the following. See Section 2905.34, Revised Code. Its pertinent parts are as follows: . . .*
>
> "This statute was effective September 15, 1970, after the filing of the complaint, but before the decision of the lower court. The film was exhibited after the effective date, and the trial de novo was held after the effective date of the statute. Other statutes so considered are:
>
> "Section 2905.08 Revised Code—Adultery or Fornication: Section 2905.10, Revised Code—Inducing illicit intercourse; Section 2905.26, Revised Code—Prostitution, lewdness and assignation defined: Section 2905.30, Revised Code—Indecent exposure: Section 2905.31, Revised Code—Nudism; Section 2905.44, Revised Code—Sodomy." (Our emphasis.)

The Ohio Supreme Court in its opinion herein in *State ex rel. Keating v. Vixen*, 27 Ohio St. 2d 278, 272

N.E.2d 137 (July 21, 1971) removed all doubt that the above decisional law represented an authoritative interpretation of the word "obscene" in the State of Ohio, at page 140:

> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse.
>
> "*Since the real issue before this court is whether the injunction should be dissolved, or continued* in force and *effect, R.C. §§ 2905.34 and 2905.35 are applicable at this time notwithstanding their enactment postdates the injunction granted below.*[1]
>
> "*Those two sections, now the law of Ohio, when construed together and applied to the instant facts,* effectively provide that: 'No person, with knowledge of the content and character of the * * * motion picture * * * involved, shall * * * present *such* motion picture * * * before an audience *which* contains a series of displays * * * of * * * sexual intercourse * * * the cumulative effect of which is a dominant tendency to appeal

[1]On this principle alone the *Vixen* case should have been affirmed. There is nothing that bars a State Supreme Court from giving interpretative rulings piecemeal, where the only issue before the State Supreme Court is whether or not an injunction should issue. If that were not so, how did this Court's ruling in *United States v. 12-200 ft. Reels of Super 8 mm. Film* at slip opinion, page 7, footnote 7 differ? Further, what principle of jurisprudence requires "specific standards", either legislatively created or judicially created, on noise or odor emissions before an Equity Court can make a determination in a civil action that a given activity is the proper subject of an injunction because it is being operated against the public welfare. Petitioner submits that this is a case of not seeing the forest for the trees.

to prurient interest, when the appeal to such interest is * * * for commercial exploitation. * * *" (Italicized words supplied.) So stated, they proscribe conduct which 'bears no necessary relationship to the freedom to speak, write, print or distribute information or opinion.' Schneider v. State (1939), 308 U.S. 147, 161, 60 S.Ct. 146, 150, 84 L.Ed. 155.

"*Doubt can no longer remain that the depiction of purported acts of sexual intercourse on the movie screen and the public exhibition thereof 'for commercial exploitation rather than for a genuine, scientific, educational, sociological, moral, or artistic purpose' is forbidden by Ohio law.* Here, there is no dispute as to the fact that 'Vixen' does depict numerous acts of *purported sexual intercourse,* and obviously it does so for a commercial purpose. No useful purpose could be served by remanding the cause to a lower court for consideration of the impact of those two statutes. (Our emphasis.) * * *

"*Therefore, where scenes in a motion picture film depict purported acts of sexual intercourse and are exhibited for commercial exploitation, those scenes are violative of R.C. §§ 2905.34 and 2905.35, constitute a 'nuisance' within the meaning of R.C. § 3767.01, and their exhibition may be enjoined as provided in* R.C. § 3767.02 *et seq.*" (Our emphasis).

"It is an ancient maxim of the law that 'legis interpretatio legis vim obtinet'; that is to say, the authoritative interpretation put upon the written law by the courts acquires the force of law, by

becoming, as it were, a part of the statute itself. The importance of adhering to this rule is seen in the fact that the judicial explanation of an obscure or ambiguous statute is at once accepted as correct by those whose rights or actions may be affected by the statute, and innumerable transactions will thereafter depend for their validity and effect upon the permanence of the judicial construction in view of which they were had. 'The court almost always, in deciding any question, creates a moral power above itself.' " Black on Interpretation of Laws, Second Edition at page 616.

Ohio Revised Code Section 2905.34 Provides Specific Standards of the Type Exemplified by This Court in California v. Miller.[18]

Ohio Revised Code Section 2905.34 reads as follows:

R.C. 2905.34:

As used in Sections 2903.13 to 2903.16, inclusive, and Sections 2905.34 and 2905.39, inclusive, of the Revised Code:

(A) Any material or performance is "obscene" if, when considered as a whole and judged with reference to ordinary adults, any of the following apply:

(1) Its dominant appeal is to prurient interest;

(2) Its dominant tendency is to arouse lust by displaying or depicting nudity, sexual excitement,

---

[18]Note, in particular, O.R.C. Section 2905.34A (2) and (4) and the reference in those sections to "sexual conduct" as that term is defined in Section 2905.34(D).

or sexual conduct in a way which tends to represent human beings as mere objects of sexual appetite;

(3) Its dominant tendency is to arouse lust by displaying or depicting bestiality or extreme or bizarre violence, cruelty, or brutality;

(4) It contains a series of displays or descriptions of nudity, sexual excitement, sexual conduct, bestiality, extreme or bizarre violence, cruelty, or brutality, or human bodily functions of elimination, the cumulative effect of which is a dominant tendency to appeal to prurient interest, when the appeal to such interest is primarily for its own sake or for commercial exploitation, rather than for a genuine scientific, educational, sociological, moral, or artistic purpose.

(B) "Nudity" means the showing, representation, or depiction of human male or female genitals, pubic area, or buttocks with less than a full, opaque covering, or of a female breast with less than a full, opaque covering or any portion thereof below the top of the nipple, or of covered male genitals in a discernibly turgid state.

(C) "Sexual excitement" means the condition of human male or female genitals when in a state of sexual stimulation or arousal.

(D) "Sexual conduct" means masturbation, homosexuality, lesbianism, sadism, masochism, natural or unnatural sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, a breast.

(E) "Material" means any book, pamphlet, ballad, printed paper, phonographic record or tape, motion picture film, print, picture, figure, image, description, or other tangible thing capable of being used to arouse interest through sight, sound, or in any other manner.

(F) "Performance" means any motion picture, preview, play, show, skit, dance, or other exhibition performed before an audience.

While the above statute was not effective until September 15, 1970, which was after the *Without A Stitch* and *Vixen* trials (a fact noted in the footnote at page 187 in *State ex rel. Ewing v. A Motion Picture Film Entitled "Without A Stitch"*) that statute with its specific standards was considered by both the Court of Appeals of Lucas County and the Ohio Supreme Court in applying the Ohio judicial standard of obscenity to the Civil Law Question of whether or not the films should be enjoined.

As noted by the Ohio Supreme Court in its opinion in *State of Ohio ex rel. Keating v. A Motion Picture Film Entitled Vixen, supra,* at page 141 no "ex post facto" issue was presented, inasmuch as that lawsuit was civil in nature, and involved only one issue; namely whether or not an injunction should issue. Compare here the problems raised by this Court's decision of June 21, 1973, in the criminal appeals in *Miller v. California,* .... U.S. .... (June 21, 1973); *Kaplan v. California,* .... U.S. .... (June 21, 1973), and a host of other criminal convictions which appeared on the 1972 October Term obscenity docket and whose judgments were vacated, as well as other criminal convictions at various stages of appellate review. See *Cole*

v. Arkansas, 333 U.S. 196, 92 L.Ed. 644, 68 S.Ct. 514 and Justice Black dissenting in *Ralph Ginzburg v. U.S.*, 383 U.S. 463, 477, 16 L.Ed.2d 31, 42, 86 S.Ct. 942 (March 21, 1966).

The above statement of facts as to specificity of Ohio Standards had no particular significance at the time that the Motion to Affirm was filed herein. As pointed out in Petitioner's Suppplemental Brief in Support of Motion to Affirm[2] this Court has, for the past

---

[2]The Supplemental Brief in Support of Motion to Affirm was filed with this Court for the purpose of advancing certain arguments against the Court's action in reversing the judgment of the Washington Supreme Court in *Rabe v. Washington*, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.Ct. 993 (March 20, 1972). At page 23 thereof, petitioner herein submitted that the "fair notice" problem should be dealt with through the "scienter" issue rather than by suggesting that the word "obscene" was vague. Petitioner submits that, in moving toward specificity this Court has gambled heavily upon factors beyond its control, such as the state judiciary's (1) ability to recognize and (2) willingness to follow the solution which the majority offers. With two routes left open, those of an opposing philosophy are not likely to follow such leadership, even though it comes from a majority of this Court. The majority of this Court must recognize that were Associate Justices Douglas, Brennan, Stewart and Marshall now sitting on state and trial appellate courts, those justices would seize the opportunity to apply their personal philosophical view, which abhors obscenity legislation, and would strike the state statutes as vague. The same result can be expected in many of the state courts below. This has already occurred in the Santa Monica, California Superior Court where Judge George Dell has sustained defendant's demurrers in *People of the State of California v. Bloom, Appelby and Sommers* (See Daily Variety article of Thursday July 12, 1973 at Appendix A-1 and note Judge Dell's ruling on Oral Copulation Law in Los Angeles Times, dated September 12, 1972 at Appendix A-2) on July 18, 1973, Allen County Superior Court Judge Robert L. Hines held that the Fort Wayne City Ordnance, which used the same definition as the Indiana Statute, was unconstitutional because it did not specifically itemize exactly what conduct was barred, and dismissed *City of Fort Wayne v. Gregory Myers and Mary Streidel* which arose out of a showing of the film "Deep Throat" at the Cinema X in Fort Wayne, Indiana. All of which portends a considerable amount of difficulty for the cases which were remanded

15 years denied the need for specificity in the area of obscenity. See Supplement Brief in Support of Motion to Affirm at pages 11-17, and, in particular, page 15 *et seq.*.

"There is no question whatsoever that the *Roth* Court completely rejected the need for specificity in this area. On the same day that *Roth v. U.S* (*supra*) was decided, that Court had an option. It had before it *Adams Newark Theatre Co. v. Newark*, 354 U.S. 931, 1 L.Ed.2d 1533, 77 S. Ct. 1395, dealing with a city ordinance which utilized 'specificity', designed to control burlesque shows appearing at the Newark Adams Theatre. In 126 Atl.2d 340, the two ordinances were described at page 341:

. . . The original ordinances, in general terms, condemned lewdness, obscenity or indecency on the part of the actor or the show, but the amendments specifically place certain conduct within these prohibited classifications.

'Since the language of the amendatory ordinances is materially identical, it becomes necessary to quote the new provisions of only one:

' "The removal by a female performer in the presence of the audience of her clothing, so as to make nude, or give the illusion of nudeness, of the lower abdomen, genital organs, buttocks or breasts;

' "the exposure by a female performer in the presence of the audience, or the giving of the illusion of nudeness in the presence of the au-

---

on June 21, 1973 and June 25, 1973, and suggests the need for additional guidelines at an early date in the 1973 October Term of Court.

dience, of the lower abdomen, genital organs, buttocks or breasts;

' "the exposure of a male performer in the presence of the audience of the genital organs or buttocks;

' "the use by a performer of profane, lewd, lascivious, indecent or disgusting language;

' "the performance of any dance, episode, or musical entertainment, the purpose of which is to direct the attention of the spectator to the breasts, buttocks or genital organs of the performer." '

The *Roth* Court rejected the invitation to open Pandora's box (see the New Jersey Supreme Court opinion in *Adams Newark Theatre Co. v. Newark*, 12 N.J. 267, 343, 96 Atl.2d 519, where that court points up the 'constant dilemma') and simply granted the City of Newark's motion to affirm, without argument. Compare the recent decisions of this Court in *Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284, 91 S.Ct. ..... (June 7, 1971) and *Gooding v. Wilson*, ... U.S. ..... 31 L.Ed.2d ....., ... S.Ct. ..... (Mar. 23, 1972), and note Associate Justice Blackmun's dissent in *Gooding* that, 'The Court has painted itself into a corner from which it, and the states, can extricate themselves only with difficulty.' "

The sudden about face from the direction in which the Court had been moving,[8] which occurred on June 21,

[8]The Court is deceiving itself if it believes that "specificity" is the elixir which will solve this Court's obscenity problems. This nation's difficulty has been with the individual members of this Court, not with the definition of obscenity. Consider the disas-

1973 in the above cases, has made the above mentioned historical facts in the Ohio jurisdiction and the disposition of the *Vixen* case a matter of paramount importance.

If this Court does not examine and affirm the action taken by the Ohio judiciary and publish the same as the proper direction for state courts to move, it will be impossible to construct a legal argument to implement this Court's instruction, which, as Petitioner understands the same to be, calls for the engrafting of "specificity" onto the obscenity statutes through the application of "judicial gloss". Further the pornographers will deny that the specificity required by this Court can be achieved through the application of "judicial gloss" —their argument will be, "If that is what the Court meant to suggest, why was Vixen not affirmed?"

---

trous result this Court's transitory rulings have had on the State of Florida for the past 15 years. Until *Roth-Alberts*, 354 U.S. 476 (1957), Florida employed a judicial test for the word "obscene." In an effort to conform with this Court's direction, the Florida legislature codified the *Roth-Alberts* test, only to have that test thrown into doubt by the tri-partite test enunciated by Justices Fortas, Warren and Brennan in *A Book Named Memoirs of a Woman of Pleasure v. Attorney General of Massachusetts*, 383 U.S. 413, 16 L.Ed. 2d 2, 6, 86 S.Ct. 975, and declared unconstitutional by a three-judge federal district court in *Austin v. Meyer*, 319 F.Supp. 457 (Aug. 14, 1970). A direct appeal in that matter was filed with this Court on November 5, 1970, but this court carried the case on its docket for two years and seven months without rendering a decision. Finally in desperation, the Florida legislature in 1973 enacted a new statutory test, based upon the tri-partite test in *Memoirs* only to have this Court rule on June 21, 1973 that that, also, was inadequate. While the Florida Supreme Court in *Florida v. Reese*, 222 So.2d 732, decided May 21, 1969, declared itself ready and willing to follow this Court's policy:

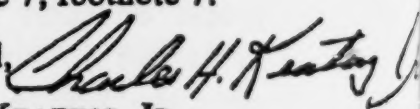
> "There can be no doubt that prosecutions under an obscenity statute may be initiated and tried under a court-adopted standard of obscenity as well as under a legisla-

(This footnote is continued on next page)

Conclusion.

Petitioner prays that a rehearing be granted as to this Court's decision of June 25, 1973 and that the judgment of the Ohio Supreme Court be affirmed on the merits in accordance with the principles expressed by this Court in *United States v. 12-200 ft. Reels of Super 8 mm Film*, slip opinion at page 7, footnote 7.

Respectfully submitted,



CHARLES H. KEATING, JR.,
Attorney for Appellee.

---

tively prescribed one. See *Roth v. U.S.* . . . If subsection (10) were deleted from the statute, the situation would revert to what it was prior to its adoption, that is, the courts of this state could adopt the later pronouncements of the United States Supreme Court . . ."

it was never able to place that policy into effect.

Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

CHARLES H. KEATING, JR.,
Attorney for Appellee.

Certificate of Service.

I hereby certify that on this 19th day of July 1973, copies of the within Petition for Rehearing were airmailed, postage prepaid, to the below listed parties to the proceedings. I further certify that all parties requested to be served have been served.

ELMER GERTZ,
120 South La Salle Street,
Chicago, Illinois 60603.

CHARLES H. KEATING, JR.,
Attorney for Appellee.

APPENDIX H

COPY OF "PETITION FOR REHEARING" FILED BY APPELLEE OHIO EX REL CHARLES H. KEATING JR. IN 1973 IN A MOTION PICTURE FILM ENTITLED "VIXEN" ET AL V. OHIO EX REL. CHARLES H. KEATING JR. 413 U.S.905 (JUNE 25, 1973), REQUESTING A REHEARING BASED UPON THE ANALYSIS OF ASSOCIATE JUSTICE BURKE IN TRANS LUX DIST. CORP. V. BOARD OF REGENTS OF THE UNIVERSITY OF NEW YORK.

(Reference: Motion For Leave To Intervene and Petition For Writ Of Certiorari, at page 23).

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-599

A MOTION PICTURE FILM ENTITLED "VIXEN", RUSS MEYER, EVE PRODUCTIONS, INC., MALIBU, INC., AND CLARENCE P. GALL,

Appellants,

vs.

STATE OF OHIO, *ex Rel.* CHARLES H. KEATING, JR.,

Appellee.

Appeal From the Supreme Court of Ohio.

MOTION TO AFFIRM.

By letter dated January 12, 1972, Appellee was informed by the Clerk of this Court as follows:

> "The Court has directed this office to request that counsel for the appellee file a response in this case."

Pursuant to such request, Appellee submits the following response.[1]

[1]As a partial reply to Appellant's Jurisdictional Question No. 2, which attacks the constitutionality of the Ohio Nuisance Statute, O.R.C. section 3767.01 *et seq.* on its face, appellee has incorporated by reference in the argument hereinafter, the arguments made by him on that same issue in the Brief Amicus Curiae filed by him in *Grove Press Inc. et al. v. Anthony*

(This footnote is continued on next page)

During the past 15 years, a blanket of confusion has engulfed the motion picture production area and all but destroyed that industry's understanding of the public responsibility which it bears under this Nation's obscenity laws. Such confusion[2] is due in no small part to the failure of this Court to enunciate a judicial philosophy which truly reflects the public mores which have governed this Nation since its founding. A casual reference to and brief reflection on the moral laws of this Nation dealing with sexuality, as codified by the state legislatures (see footnote 1 and Brief Amicus Curiae of Keating in Flask at Appendix E, pp. 1-11) is cogent proof that such public mores do presently exist and are well defined. See also, *City of Youngstown, Ohio v. DeLoreto*, 251 N.E.2d 291, 48 Ohio Op. 2d 393 at 400 (Sept. 10, 1969); *State of Ohio ex rel. Ewing v. Without A Stitch*, 57 Ohio Op. 2d 184 at 187 (July 9, 1971); and *State of Ohio ex rel. Keating v. Vixen*, 272 N.E.2d 137 at 140, 27 Ohio St. 2d 278 (July 21, 1971).

B. Flask, et al., October Term 1970, No. 360, which case has been carried over to the 1971 October Term as No. 70-1. Copies of the Brief Amicus Curiae of Keating in Flask, hereinafter referred to by that title, have been served on Appellants concurrently with this motion, with such arguments appearing at pages 28-53 and 86-125.

[2]The Court in *People v. Kirkpatrick*, 316 N.Y.S.2d 37 (Oct. 28, 1970) had the following to say at page 42 on this general confusion as it related to the criminal law:

> "There is perhaps no area of criminal law in such utter state of confusion and frustration as that visited upon the publication and dissemination of obscene material 'Confusion now hath made its masterpiece' (Macbeth, Act II).
>
> "The confusion, in great measure, must be attributable to the incredible divergence of views of the men on the United States Supreme Court, to whom all look for guidance . . ."

The world famous "Hollywood" Blvd. named in honor of the motion picture industry has become "Hollywood Babylon." See Appendix E, pages 2-5.

The foundation for this confusion in the motion picture area was laid in this Court's treatment of the Lady Chatterly's Lover's appeal, reviewing the refusal of the New York Court of Appeals in *Kingsley International Pictures Corp. v. Board of Regents*, 165 N.Y. Supp. 2d 681 (July 24, 1957) to license the film "Lady Chatterly's Lover" as violative of Sections 122 and 122(a) of the New York Education Law. Those sections *required* the denial of a license to a motion picture, ". . . the dominant purpose or effect of which is erotic or pornographic; or which portrays acts of sexual immorality, perversion, or lewdness, or which, expressly or impliedly presents such acts as desirable, acceptable or proper patterns of behavior. . . ." Associate Justice Stewart's opinion in *Kingsley International Pictures Corp. v. Board of Regents*, 360 U.S. 684, 3 L.Ed.2d 1512, 79 S.Ct. 1362 (June 29, 1959), reversing the New York court's ruling (concurred in by Justices Brennan, Warren, Black and Douglas) is critically attacked by Terrence J. Murphy in his book, "Censorship: Government and Obscenity".[8] in Appellee's view, Terrence Murphy correctly points up the root of this Nation's present misery at page 183:

> "The Court went out of its way to find in the New York statute a prohibition of nothing more than an abstract expression of an idea. By culling out of the opinion of the lower court and emphasizing such phrases as 'a proper pattern of be-

[8]Chapter 12 of "Censorship: Government and Obscenity" entitled "Order and Morality" is reproduced hereinafter at Appendix E pages 6-13. Appellee submits that the persuasive nature of Terrence Murphy's Analysis and the history of succeeding events present grounds for a reappraisal of that decision. It bears mention that only three members participating in the "Lady Chatterly's Lover's" decision are sitting on the present Court.

haviour' Mr. Justice Stewart changed the New York law from a prohibition of the advocacy of sexual immorality plus obscenity to the prohibition of an intellectual discussion 'of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax.' *Mr. Justice Stewart notwithstanding, a movie advocating adultery and using all the techniques of sound, color and sight to depict or suggest obscene sequences is quite different both in its social effects and in its manner of presentation from a film presentation of Henry George's antiquated theory of a single tax.*

The Court never met the argument that the state must protect 'order and morality.' New York argued that obscenity laws are ordered to the protection of the public interest in 'order and morality.' The corrupting influence on order and morality must be kept in mind in considering obscenity. To lose sight of the objective of the law by narrowly considering only the prurient appeal aspect of the obscenity law is to become so enarmored with a means as to lose sight of the end. Obscenity is prohibited not just because it excites the sexual appetite but rather because such excitation has a 'corrosive effect upon the public sense of sexual morality.'[20] The goal of the law is the protection of the public interest in order and morality. It cannot achieve this end if it does not concern itself with all the means by which the public order can be subverted. Consequently to hold as obscene that which is saturated with prurient sex while holding that material which advocates sexual immorality and is something less

> than saturated with prurient sex is not obscene is to close one avenue of attack on the community while opening up another route to the same destination . . ."

So that Appellee's analysis and contentions may be examined in proper prospective, Appellee has attached hereto at Appendix F pages 2-55 for this Court's benefit, a time-motion study of "Lady Chatterly's Lover", consisting of a chronological series of photographs, timed in their relative order of appearance, depicting the conduct visually portrayed in the film, "Lady Chatterly's Lover" and the philosophical issues raised in that case. The offending conduct appears at Appendix F, photographs 636 to 703, 796 to 876, 1075 to 1091 and 1258 to 1297. The "Lady Chatterly's Lover" issue was presented in civil litigation (involving no "mens rea" issue or criminal punishment) which, under one view, drew in issue the basic right of a state government to proscribe obscene conduct on the public screen—the very right upon which the Ohio Supreme Court relied in affirming the judgment of the Court of Appeals below. This Court should note that Associate Justice VanVoorhis of the New York Court of Appeals, a dissenter in the state court below, would have solved the "thought control" problem which bothered Justice Stewart by holding at 175 N.Y.Supp. 2d at 60:

> ". . . certain passages might have been eliminated as 'obscene' without doing violence to constitutional liberties. In their endeavor to censor morality, both the Motion Picture Division and the Regents seem to have overlooked their power to exclude 'obscenity' which includes the portrayal on the public screen of sexual intimacies *whether they be marital or extramarital* . . ." (Our emphasis.)

Appellee submits that had this Court's opinion in the "Lady Chatterly's Lover" case recognized the principle urged by Justice VanVoorhis and relied upon by the Ohio Supreme Court below, Appellant Russ Meyer would never have been seduced into gambling on his "Immoral Mr. Teas", "Lorna", etc. (see here the testimony of defense witness Arthur Knight appearing at Appendix C pages 2-72) and "Vixen" and its progeny would never have appeared as a plague on the American Courtroom scene.

This Court was presented with a second opportunity to undercut the advance of pornography in the motion picture industry when, during the 1964 October Term, the New York Court of Appeals' decision in *Trans-Lux Distributing Corp. v. Board of Regents*, 248 N.Y.S. 2d 857 (Mar. 26, 1964) denying a license to the Swedish film, "A Stranger Knocks", appeared on this Court's docket. A time-motion study of the film, "A Stranger Knocks" is attached hereto at Appendix G pages 2-43 to refresh the recollection of those justices who voted in that matter and as a reference for those members of the present Court who were not then sitting. The latter film's only claim to fame was predicated upon two scenes depicting explicit sexual intercourse. The first took place on a beach (see Appendix G, photographs 644 to 711). The second was a 2-minute scene of sexual intercourse, including climax, between the male lead lying on his back on the couch with the female lead astride and on top of him, but with both parties fully clothed and the female's skirt concealing the contact of the sex organs (see Appendix G, photographs 1149 to 1249).

Justice Burke, speaking for the majority of the New York Court of Appeals below, in denying a license

to "A Stranger Knocks" adhered to the fundamental governmental principles relied upon by Terrence Murphy in his critical analysis of Justice Stewart's opinion in the "Lady Chatterly's Lover" case. Instead of granting a hearing and coming to grip with this very real issue in the *Trans-Lux* case, the 1964 Court chose instead to hear the appeal in *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed.2d 649, 85 S.Ct. 734 (Mar. 1, 1965), struck down the Maryland Censor Board statute and summarily reversed *Trans-Lux*, citing *Freedman* as the basis for the reversal. *Trans-Lux Distributing Corp. v. Board of Regents*, 380 U.S. 2d 59, 13 L.Ed.2d 959, 85 S.Ct. 952 (Mar. 15, 1965). See Brief Amicus Curiae of Keating in Flask at page 109-110. Appellee would point out to this Court that it was Justice Burke's rationale in the *Trans-Lux* case below which the Ohio Supreme Court relied upon in affirming the "*Vixen*" decision of the Hamilton County Court of Appeals below. The Ohio Supreme Court noted in *Ohio ex rel. Keating v. "Vixen"*, 272 N.E.2d 137 at 140:

> ". . . the Supreme Court did not reach the substantive issue of speech versus conduct as applied to films by the New York Court of Appeals."

and phrased the rhetorical question:

> "Assume, hypothetically, that the main character in 'The Sound of Music' performs, during one scene an act of sexual lewdness. Could we permit that part of the film to go unregulated merely because the producer had 'an eye on the recent Supreme Court rulings?' The question supplies its own answer."

For failure of this Court to enunciate a judicial philosophy in conformity with traditional moral law,

this Nation finds its public mores in the year 1972—13 years after the "Lady Chatterly's Lover" decision and 7 years after the "A Stranger Knocks" ruling—in a state of collapse, and the motion picture industry dominated by pornographers and ruled by anarchy. With *Kingsley International Pictures Corp., supra,* as the foundation, and this Court's inaction in *Trans-Lux Distributing Corp., supra,* providing the mortar,[4] pornographers such as defendant producer, Russ Meyer, and his *alter ego,* defendant national distributor Eve Productions, Inc.; have constructed a modern-day version of the Tower of Babel[5] within the motion picture in-

---

[4]Although *Jacobellis v. Ohio,* 378 U.S. 184, 12 L.Ed.2d 793, 84 S.Ct. 1676 (June 22, 1964), also acted as a catalyst, that case did not, as did Trans-Lux, squarely draw in issue the fundamental right of state government to proscribe lewd acts. Jacobellis was an appeal from a criminal conviction which was dominated by the collateral "mens rea" issue.

[5]The brazenness of certain producers leads Appellee to conclude that such operators are convinced that the confusion is so great they can disregard the law. What the Court might now say, as for example, this Court's recent pronouncements in *United States v. Reidel,* 402 U.S. 351, 28 L.Ed.2d 813, 91 S.Ct. 1410 (May 3, 1971), and *United States v. 37 Photographs,* 402 U.S. 373, 28 L.Ed.2d 822, 91 S.Ct. 1400 (May 3, 1971) does not bother them. It took two months of courtroom endeavor before Appellant in *Ohio ex rel. Keating v. Cinema International of Cincinnati, Inc., Court of Common Pleas, Hamilton County,* Case No. A261971 was able to secure injunctive relief from the Hamilton County Common Pleas Court in a petition filed on Nov. 17, 1971, under the Ohio Nuisance Statute, where the subject matter being exhibited at the downtown "Cinema X" Theatre involved conduct such as oral copulation of the male penis in the mouth of a female to the point of ejaculation. See Appendix H, pages 2-57, a time-motion study of the Cinema X program for the week November 17-23, 1971. The Common Pleas Court was inclined at first to listen to arguments based upon Justice Stewart's rationale in the "Lady Chatterly's Lover" case that such depictions (oral copulation) were "protected speech." In a similar vein see the Daily Variety Article of Feb. 18, 1972, page 3, reporting on the Los Angeles trial of Tom Parker, his sons Rick and Morrie, and their *alter ego,* the corporation Topar Films, reproduced hereinbelow, where defense attorneys were permitted to introduce

dustry. (See also Appendix E at pages 2-5 depicting Hollywood Blvd. today.)

Appellee submits that if this Nation is to continue its existence as a moral society, the fallacious reasoning expressed in the *Lady Chatterly's Lover* case must be re-examined. The federal questions spawned by that rationale require an immediate answer of unmistak-

---

testimony of medical experts who testified that films which graphically depict sexual activities such as oral copulation have redeeming social importance and are necessary to maintain an open dialogue in the community regarding sexual matters! For a correct statement of the law see *Ohio ex rel. Sensenbrenner v. Adult Book Store*, 271 N.E.2d 13 at 29 (Mar. 2, 1971).

THREE ACQUITTED
OF CONSPIRACY TO
SELL OBSCENE FILMS

An acquittal in L.A. Superior Court yesterday of Topar Films and its three owners on charges of conspiracy to sell and distribute alleged obscene films and pandering may pave way for future acquittals in cases involving "adult films."

Although the jury found 49 films, all showing graphic sexual activity, including scenes of sexual acts and oral copulation, not obscene, two of the three defendants were convicted of two counts of oral copulation.

Films were seized by L.A. police last March 6 from Topar Films Inc. when they answered an ad offering the films for sale. Arrested at that time were Tom Parker, Topar prez, and his sons, Rock and Morrie.

Each faced charges of conspiracy to sell and distribute, two counts of pandering, conspiracy to commit oral copulation and commission of that act.

At the time the case was filed, district attorney's office said it would be the major obscene prosecution filed by that office.

In the pandering charges, defendants were accused of soliciting girls to work in movies and have them perform sexual acts, including oral copulation.

Defendants' attorneys Anthony Michael Glassman and Richard G. Hirsch introduced testimony of medical experts, all of whom testified that films which graphically depict sexual activities such as those shown to the jury have redeeming social value and are necessary to maintain an open dialog in the community regarding sexual matters.

(This footnote is continued on next page)

able clarity. That purpose can only be accomplished by this Court's squarely coming to grips with the problem in a factual setting devoid of collateral issues which detract from the main issue. While this Court has noted jurisdiction in *Washington v. Rabe*, 484 P.2d 917 (Apr. 6, 1971) involving the criminal conviction of the manager of an outdoor drive-in theater in Richmond, Washington, for exhibiting the motion picture film, "Carmen Baby", and is about to hear arguments in that case, the factual setting and the narrow grounds upon which that case was decided do not permit an examination of the basic issue raised by the Ohio Supreme Court herein, *i.e.*, the inherent right of a state government to enjoin the public display of lewd sexual conduct[8] on the motion picture screen.

---

8 Films Shown Jury

The jury was shown eight films stipulated as being representative of the 49 offered for sale.

Prosecution witnesses testified they saw one of the defendants drive girls to the place where the movies were being made and saw the girls commit oral copulation on two of the defendants. It apparently was on this testimony that the father and son Morrie were convicted of the oral copulation charges. Rick was apparently not involved, nor were the girls charged.

Glassman said it is inconceivable to him how the jury could determine that the films were not obscene, yet part of those same films involves obscene acts. Conviction under Section 288 A, Oral Copulation, carries up to a 50-year sentence, Glassman said this will be basis for an appeal.

This court and the pornographers have the governmental attorneys chasing their tails. The City Attorney's Office in one large city is now looking for "experts" to rebut such testimonyl (*instead of objecting that the same is incompetent, irrelevant and immaterial and does not bear on any of the issues*).

[8]Associate Justice Hale in his concurring opinion in *Washington v. Rabe, (supra)* recognized that the majority's opinion did not meet the issue squarely, at page 926:

> "Although the Supreme Court of the United States, as is seen in the Court's opinion, has the last word on freedom of speech, I think it has no jurisdiction whatever under

In the *Rabe* case the picture screen of the outdoor theater faced 12 to 15 adjoining family residences and a portion of a nearby major highway so that pictures on the screen were visible to residents of those homes and their guests, to passing motorists upon the highway, and to those persons who would look at the screen from just outside the chain link retaining fence enclosing the theater grounds. The majority of the Washington court chose to decide the case on the much narrower issue of the "potential" audience among which were several groups of unwilling participants.

In concurring in the result reached in *Washington v. Rabe*, (but not the majority opinion), Associate Justice Hunter, in his separate opinion at page 926, would have gone further and affirmed on the grounds that "Carmen Baby" was obscene as to all audiences under the Washington State obscenity laws. Appellee submits that such a determination *in a criminal case* might very well have again opened up Pandora's Box in the closed conference room of this Court. See here *Cain et al. v. Kentucky*, 437 S.W.2d 769, involving a criminal conviction of the manager of the Crescent Theater in Louisville for exhibiting "I A Woman" (also, an Audobon film), reversed in *Çain et al. v. Kentucky*, 397 U.S. 319, 25 L.Ed.2d 334, 90 S.Ct. 1110, rehearing denied 397 U.S. 1081, 25 L.Ed.2d 819, 90 S.Ct. 1520 (Mar. 20, 1970) on the authority of this Court's no-clear majority decision in *Redrup v. N.Y.*, 386 U.S.

---

the Constitution—except perhaps for the District of Columbia—to prescribe moral, literary or social standards for the country at large. The judicial duty to protect freedom of speech and press in the Nation at large imparts no correlative power to preserve obscenity and pornography in the states . . . A different rule I think, would constitute a direct attack on the ideas of self government."

767. (See footnote 10.) Appellee submits that the result in *Cain* should have been otherwise had the *sole* issue in that case been the right of the State of Kentucky, acting through its Court of Appeals, to enjoin the showing of "I A Woman" on the grounds that the public conduct displayed therein was in derogation of that State's basic moral laws regulating public conduct.[1] For the same reason, the issues in the *Rabe* appeal now before this Court would be totally different (as they are in the "Vixen" appeal) were the producers and distributors of "Carmen Baby", Radley Metzger, Ava Leighton and their *alter ego* "Audobon Films" before this Court on the injunction issue, for both "I A Woman" and "Carmen Baby" were cast from the same (Audobon) mold. See here the pictorial continuities for Audobon's previews for the film, "I A Woman" and "Carmen Baby" appearing at Appendix I pages 2 to 3, the pictorial continuity for "Carmen Baby" appearing at Appendix I pages 4 to 11 the pictorial continuity for "I, A Woman" appearing at Appendix I pages 12-21, and the *modus operandi* and history of Audobon Films, Inc., set forth in the preliminary prospectus filed with the Security and Exchange Commission on August 27, 1969, pages 1 to 12, which are reproduced at Appendix I, pages 22-33. At the time of "Carmen Baby's" appearance on the screen in 1967, the sexual depictions contained therein were regarded as every bit as pornographic as the sexual scenes in

---

[1]Justice White and three other justices not now sitting (Justices Warren, Clark and Harlan) recognized this distinction in their dissenting votes in *Tralins v. Gerstein*, 378 U.S. 576, 12 L.Ed.2d 1033, 84 S.Ct. 1903 (June 22, 1964), and *Grove Press, Inc. v. Gerstein*, 378 U.S. 577, 12 L.Ed.2d 1035, 84 S.Ct. 1909 (June 22, 1964) where the sole issue before the Court was the right of the state court to enjoin such distributions.

"I Am Curious (Yellow)". Compare Appendix I pages 4 to 11 with the photographic continuity for "I Am Curious (Yellow)" appearing in Brief Amicus Curiae of Keating in *Flask* at Appendix A, pages 2 to 9 and note in particular at Appendix I photographs 110 to 123 depicting fellatio. If this Court does not roll back the pages of history to correct its erroneous opinion in the *Lady Chatterly's Lover* case, those scenes will next appear on television, as both Russ Meyer and Radley Metzger have personally stated for the record.

If this Court has no empathy with panderers like Russ Meyer and Eve Productions Inc., and it appears certain at this point that such is the case,[8] then this Court should grant plenary review herein and resolve, once and for all, the merits of the Ohio decision enjoining the conduct of defendant producer Russ Meyer, and his *alter ego*, defendant exhibitor Eve Productions, Inc. A continuity on "Vixen" is incorporated herein at Appendix A, pages 2 to 71 to permit this Court to reflect on Meyer's "production".[9] See also footnote 1

---

[8]See *Samuel Roth v. U.S.* and *David Alberts v. Calif.*, 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (June 24, 1957) *Ralph Ginzburg v. U.S.*, 383 U.S. 463, 16 L.Ed.2d 31, 86 S.Ct. 942; *rehrg. den.* 384 U.S. 934, 16 L.Ed.2d 536, 86 S.Ct. 1440, and *Ralph Ginzburg v. U.S.*, 436 F.2d 1386, pet'n for cert. to the U.S. Court of Appeals, 3rd Circuit, denied in 402 U.S. 976, 29 L.Ed.2d 709, ... S.Ct. ....., rehrg. den. 404 U.S. 875, 30 L.Ed.2d 121, ...S.Ct. ..... (Oct. 12, 1971); *Mishkin v. N.Y.*, 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958, *rehrg. den.* 384 U.S. 934, 16 L.Ed.2d 535, 86 S.Ct. 1440; *United States v. Reidel*, 402 U.S. 351, 91 S.Ct. 1410, 28 L.Ed.2d 813 (May 3, 1971); *United States v. 37 Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 May 3, 1971); *Grove Press, Inc. v. Maryland State Bd. of Censors*, 258 A.2d 240 (Oct. 22, 1969), aff'd by a divided court in *Grove Press, Inc. v. Maryland State Bd. of Censors*, 401 U.S. 480, 28 L.Ed.2d 205, 91 S.Ct. ..... (Mar. 8, 1971)

[9]The term "continuity," as used in this brief is adapted from its parallel use in the motion picture industry.

(This footnote is continued on next page)

and the Keating Brief Amicus Curiae at Appendix D, pp. 1-14 for a photographic continuity on "Vixen," to be compared with the photographic continuity on "I Am Curious Yellow" in the Keating Brief Amicus Curiae in Flask at Appendix A, pp. 1-11. In this regard, the Court should closely examine the testimony of Meyer's own witness, Arthur Knight reproduced herein at Appendix C pages 2-72 which describes producer Meyer as the producer of "the very first skin flick or sexploitation film in the development of what one might call erotica in the modern motion picture distribution" "which film marked the turning point" (229): describes his films as "the best of the worst and the worst being the skin flicks" (269) and acknowledges Meyer's contribution to be that of turning "out a film that is superior to what those films had

---

A motion picture film production crew commences operations with a movie script. When the film is completed, a final sound track is made and appropriate corrections made to the original script, to arrive at what is termed a "continuity." Thereafter, when any controversy arises over lines, stage action, etc., the "continuity" is taken out of its file for examination. The industry does not go to the film for its analysis—it refers to the continuity for a quick and accurate response.

The "continuity" contains an accurate reproduction of the *sound* portion of the film, identifying the actors, their roles and what they say as the film progresses. In addition, selected *visual* screen depictions are captured by a still camera. These small photographs are reproduced at the exact point in the dialogue where such images appear, creating a miniature screen effect. The story line is broken down into its integral scenes and timed from beginning to end to identify those segments in point of importance (or exaggeration) for the benefit of the justices censoring this appeal.

The inability of the mind to recall accurately and chronologically the rapidly moving visual and audio "facts" presented in a motion picture film point to the need for recording accurately, as much of the factual material as is possible, for use in conjunction with the principle of "past recollection recorded." As that concept has utility for purpose of oral argument. With the latter accessory, an intelligent analysis and examination of the film based on its content is possible.

been, and so there is an improvement in quality that has allowed them to move out of the grind houses . . . into the neighborhood houses." (267). Arthur Knight's testimony tells the history of the sexploitation film and Russ Meyer's primary role therein which indicts Meyer as a panderer the equal of *Roth, Alberts, Ginzburg, Mishkin, et al.*

If certain members of this Court have difficulty resolving criminal cases in this area because of the *mens rea* requirement,[10] then certainly the civil abatement statute is the proper forum for considering the constitutional issue raised by Associate Justice Hale of the Washington Supreme Court in his concurring opinion in *Washington v. Rabe* (see *supra*, Note 6).

Several years ago Appellee was privileged to hear the remarks of Dr. Melvin Anchell,[11] a practicing psychiatrist, discussing the corruptive effect of pornography on society at large. In Appellee's view, Dr. Anchell's scientific remarks as to the psychiatric aspects regarding the detrimental effect of obscenity on society as a whole presented strong corroboration for the time-honored Anglo-Saxon, Judeo-Christian judicial public policy against obscenity. Convinced that if anything could move certain members of this Court away from their previous irreconcilable positions, it would be Dr.

---

[10]See *Redrup v. N.Y.*, petition for certiorari granted in 16 L. Ed.2d 438 on Apr. 25, 1966, but limited to the scienter issue. Redrup was finally resolved in a "per curiam" "no-clear majority" opinion in 386 U.S. 767, 18 L.Ed.2d 515, 87 S.Ct. 1414, involving four different individual interpretations of seven justices as to what the obscenity statutes could encompass, one of which (adhered to by two of the seven justices) refused to follow the long-standing constitutional determination that obscenity was *not* constitutionally protected.

[11]See also "Sex and Sanity" by Melvin Anchell, M.D. published by the Macmillen Company (1971).

Anchell's "common sense" testimonial evidence,[12] appellee offered such testimony in the trial below. Trial Judge Leis was sufficiently impressed to incorporate a narrative summary of Dr. Anchell's testimony in his opinion. See Appendix A, page 10, of Appellant's Statement as to Jurisdiction. That narrative summary is set forth hereinafter in full:

> "Dr. Melvin Anchell, called as an expert witness by the plaintiff, explained to the Court how human sexuality functions between men and women in society today, and what was meant by sexual perversion, and distinguished between human sexuality and perverted sexuality. He stated that 'Vixen' did not treat nymphomania in a realistic fashion; that the picture portrayed serious misconceptions in that it showed woman with an intense sex drive, which is a fallacy; that the female was illustrated as endowed with a male lust; and that the female of the human species is depicted as even sexier than the male, ready to rape him at the slightest provocation; that this unrealistic hoax that has been perpetrated on the unsuspecting public was one of the major unrecognized causes of the marital discord and for the general public belief that women have the same, if not greater desire for sexual intercourse as men.
>
> "He stated that films like 'Vixen' have a noticeable influence on the established social patterns and values and that never before in history has

[12]This Court has previously seen the merit in such logic. See *Sam Ginsberg v. N.Y.*, 390 U.S. 629, 642, fn. 10 (Apr. 22, 1968), citing with apparent approval similar remarks of Dr. Gaylin of the Columbia University Psychoanalytic Clinic, regarding the "indirect effects" of allowing pornography to exist in the Community.

a culture been so overwhelmingly and continuously exposed to abnormal and perverted sexual activities as they are today through the entertainment media.

"He further stated that modern youth cannot attend a movie without being flooded with perverse information; that the entertainment media have more influence on the behavior of the younger generation than the family, church, or established social patterns, and that this media accounts for much of the increase in perversion today; that it is virtually impossible for the inexperienced youthful mind properly to evaluate these portrayals, and that the young person identifies himself or herself with the hero and heroine who presumably represents adult pleas that the movies showing natural or unnatural genital sex activity as mature adults, make polymorphous male and female prostitutes out of young people and often cause adults to regress to the exhibitionism, voyeurism stage, or to indulge in other perversions; that the manner in which incest and lesbianism are depicted on the screen in 'Vixen' has a corruptive effect on youths over 18, and adults, and society in general, and is damaging to public morals and welfare; that the various visual and audio depictions presented in the sexual relations above set forth in detail have a corruptive effect on society; that such depiction in the mass media are currently spreading psychological venereal disease throughout the nation; that the sexual misconception illustrated in the picture have a corruptive effect on society."

Because Appellee feels Dr. Anchell's testimony is itself a strong argument in favor of this Court accord-

ing a full hearing to the issues in this case, such testimony is set out in full at Appendix B, pages 2-95.

Were this Court to decide this appeal without full briefing and argument and a written opinion of the Court, little good would be done toward advancing an understanding in this area of the law. Such was the manner in which this Court ruled in the only motion picture case in which a film was held to be obscene by this Court in recent history. See *Landau v. Fording*, 388 U.S. 456, 18 L.Ed.2d 1317, 87 S.Ct. 3109; *rehearing denied* 389 U.S. 889, 19 L.Ed.2d 199, 88 S.Ct. 16, (June 12, 1967), in which certiorari was granted and the judgment below summarily affirmed on the merits without briefing, oral argument or opinion. That decision has long since lost its identity.[18]

For all of the reasons given above, Appellee respectfully moves this Court to consider the judgment of the Ohio Supreme Court below on the merits, and to affirm the same in a written opinion after briefing and argument on two critical issues ruled upon therein: (1) the fundamental right of a state court to enjoin obscene conduct on the screen—conduct which, by its nature, is regarded as contrary to the public mores established by the state legislature and state judicial system and (2) the relevance of the factor "social importance" to the constitutional standard governing the proscription of obscenity.

Respectfully submitted,

CHARLES H. KEATING, JR.,
Appellee.

---

[18]That film (silent), "Un Chant D'Amour," was described in detail in *Landau v. Fording*, 245 Cal.App.2d 820, 54 Cal.Rptr. 177. A photographic continuity of "Un Chant D'Amour" is incorporated herein at Appendix J pages 2-15. The California court's opinion appears at Appendix J, pages 16-22 and this Court's "per curiam" affirmance at page 23.

APPENDIX I

(A) COPY OF NEWS ARTICLES IN LOS ANGELES TIMES, DATED DECEMBER 11,1987, REPORTING ON ORAL ARGUMENTS BEFORE THE CALIF. SUPREME COURT IN PEOPLE V. FREEMAN, AND THE QUESTIONS POSED BY JUSTICES KAUFMAN AND PANELLI OF THE ASSISTANT ATTORNEY GENERAL.

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 34).

(B) COPY OF NEWS ARTICLE IN LOS ANGELES TIMES, DATED NOVEMBER 18, 1987, REPORTING ON FEDERAL CIVIL RIGHTS LAWSUIT BROUGHT BY "CALL GIRL" ALMODOVAR AND FILM MAKER BULLARD CHALLENGING THE USE OF PENAL CODE SECTION 266(i) AGAINST THE MAKERS OF PORNOGRAPHIC FILMS.

(Reference: Motion For Leave To Intervene and Petition For Writ of Certiorari, at page 43).

★ Friday, December 11, 1987 / Part II 3

Sex-Film Producer's Prosecution Argued Before High Court

2926

By PHILIP HAGER, *Times Staff Writer*

SAN FRANCISCO—A state prosecutor encountered a barrage of skeptical questions Thursday from the California Supreme Court as she defended the precedent-setting use of an anti-pandering law to prosecute a Los Angeles sex-film producer.

Court members repeatedly expressed concern that using the 1982 law against film makers would violate the constitutional right to free expression and threaten the movie industry in California.

But state Deputy Atty. Gen. Lauren Dana argued that there is nothing unconstitutional in prosecuting producers who pay performers to commit sex acts on film, which she said amounts to prostitution. Such prosecutions, she said, could help stop the spread of AIDS and other sexually transmitted diseases among performers in pornographic films.

'Paid People to Act'

A lawyer for Harold Freeman, producer of more than 10[illegible] full-length sex movies who faces trial under the pandering law, contended that if Freeman can be charged, so could the makers of first-run films or even the producers of sex-education movies.

"Mr. Freeman paid people to act," said his attorney, Dennis A. Fischer of Santa Monica. "He did so for the undeniable purpose of creating a film—not to provide for sexual gratification . . . as do those who promote prostitution."

The proceedings were marked by lively exchanges and graphic descriptions as the court heard arguments in a far-reaching test of law enforcement objectives and constitutional guarantees.

In the case at issue, Los Angeles authorities invoked the pandering law—ordinarily used as a weapon against street pimps—to prosecute Freeman for hiring actresses for up to $800 a day to perform explicit sex acts in a movie called "Caught From Behind II."

Freeman, a prominent figure in Los Angeles' $500-million-a-year adult-film industry, was convicted of the charge in 1985. But a trial judge in Van Nuys refused to impose the three-year minimum prison term, sentencing Freeman instead to 90 days in jail and a $10,000 fine. The validity of the sentence is pending in a separate case before the court.

In Thursday's hearing, court members peppered prosecutor Dana with questions about using the law against movie producers.

Justice Edward A. Panelli noted that there was a "significant difference" between prosecuting a producer who films an illegal act—such as unlawful intercourse with a minor—and one who films an act between consenting adults that in itself is not illegal.

"Isn't the problem that a lot of our major, first-run films could be prohibited if you're correct?" Panelli asked Dana.

The state's attorney replied that the court could limit such prosecutions to the filming of actual sexual intercourse, thus avoiding that problem.

"So courts can decide what deserves an R rating and what deserves an X rating?" Justice Stanley Mosk asked skeptically.

"The industry would know full well what would be permitted," Dana said. "It would not prohibit touching or caressing, for example."

Pressing the point, Justice Marcus M. Kaufman asked how producers could make sure their filmmaking was legal.

Dana answered that they could employ simulated sex, rely on unpaid "volunteers" as performers or "film it in Nevada—where prostitution is legal."

When Dana conceded that under the state's theory, the filming of illegal gambling could be prosecuted if it were real gambling, Mosk remarked: "You're going to drive motion pictures out of Hollywood with that attitude."

Similarly, Appellate Justice J. Anthony Kline, appointed temporarily to sit in the case, raised the possibility that if the prosecution of Freeman were upheld, it would open the way for charges against the makers of films like "The Graduate," "Midnight Cowboy," and "Last Tango in Paris."

Fischer stressed to the justices that the law was not intended to be used against movie producers and that Freeman's prosecution "may be a way of getting at the adult film industry" where efforts to prosecute under obscenity laws have proved unsuccessful.

Even if prosecution were limited to instances involving actual intercourse, it would still violate the First Amendment, Fischer said. He suggested for instance that the law might be employed against film makers who pay performers in sex-education movies.

Top state court sympathetic to sex-filmmaker challenge

NEWS / FRIDAY, DECEMBER 11, 1987 / DAILY NEWS

By BOB EGELKO
Associated Press

SAN FRANCISCO — A sex filmmaker's challenge to his precedent-setting prosecution on pandering charges got an apparently sympathetic response from the state Supreme Court Thursday.

"A lot of our major first-run films would be prohibited" if paying actors to perform sexual acts for a movie was considered pandering, Justice Edward Panelli told a prosecution lawyer.

When Deputy Attorney General Loren Dana said major studio films would be safe from prosecution because they generally used simulated sexual intercourse, Panelli questioned the legal distinction and a defense lawyer said it was irrelevant.

Paid actors whose roles include sexual acts, actual or simulated, are not engaged in prostitution, and the film producer who pays them is not a panderer, said Dennis Fischer, lawyer for producer Harold Freeman of Encino.

Prostitutes "solicit sex for money," Fischer said. "A prostitute and a customer must exist ... and the object of that transaction is sexual gratification.

"... Mr. Freeman paid actors to act. The object was to make a film, not sexual gratification."

The court heard an hour of arguments and will rule at a later date.

Freeman's 1985 conviction on pandering charges, for paying actors and actresses to engage in actual sexual intercourse for the filming of a movie called "Caught From Behind, Part II," is a test case for Los Angeles County's attempt to use pandering laws against the sex-film industry.

Rather than trying to prove a film obscene, generally a difficult task, or reserving prosecution for those who employ minors, the District Attorney's Office is contending that producers are guilty of pandering when they pay actors and actress to perform actual sexual intercourse on camera.

Pandering, a felony, is punished by a mandatory state prison sentence of at least three years. But in Freeman's case, Superior Court Judge James Albracht said the producer's conduct was not as serious as the type of pandering associated with street prostitution, and sentenced him to 90 days in jail.

The conviction and sentence were upheld by a state appeals court that included Justice John Arguelles, who has since been named to the Supreme Court. Arguelles voted to uphold the conviction but dissented from the sentence, saying a prison term was warranted; he did not take part in Thursday's hearing.

In defending the conviction, Dana said the constitutional right of free expression would not protect a producer from prosecution for an actual crime, such as murder, committed on stage. Paying actors to perform sex is equally criminal, she said.

But Justice Marcus Kaufman noted that unlike a murder, the acts in Freeman's film "were not independently criminal, other than for

Los Angeles Times Wednesday, November 18, 1987 ★

Court Revives Suit Attacking Use of Pandering Laws Against Porn Films

By KIM MURPHY, *Times Staff Writer*

A federal appeals court Tuesday reinstated a civil rights lawsuit filed by a Los Angeles traffic officer-turned-call girl challenging the use of prostitution and pandering laws against pornographic film makers.

In a unanimous decision, the U.S. 9th Circuit Court of Appeals said there was room for First Amendment challenges to prosecutions under the statutes but said the federal courts should first allow the California Supreme Court to rule on the question.

The decision reinstates a lawsuit filed by Norma Jean Almodovar, a former civilian traffic control officer later convicted of prostitution, and film maker R.N. Bullard, who sought to make a movie graphically depicting "safe sex" practices, but said they feared they would be prosecuted.

Recent Crackdown

The suit challenges a recent crackdown against Los Angeles-area adult film makers and actors under state pandering and prostitution laws, which local law enforcement authorities say apply to the production of sexually explicit films because they make it illegal to receive money in exchange for sex.

The appeals court did not rule on the merits of the suit, under which Almodovar and Bullard are seeking to bar future prosecutions, but the plaintiffs' lawyer claimed a measure of victory in the court's pronouncement that the pandering and prostitution statutes are "susceptible" to a much narrower interpretation.

"Certainly, the requirement that sex be exchanged for money to constitute prostitution might be limited so as not to include performance before a camera," Judge Dorothy W. Nelson wrote for the court.

Pandering Conviction

However, the court said the state Supreme Court should decide on how broadly to interpret the statutes before the federal courts intervene.

In a case now pending before the Supreme Court, Los Angeles film maker Harold Freeman is challenging his pandering conviction for hiring actresses to perform sex acts in one of his films.

"If the California Supreme Court decides that the Legislature did not intend the prostitution statute to apply to films, Almodovar will have obtained all the relief she seeks without a federal decision on her constitutional claims," the appeals court said.

At the same time, by reversing a district judge's earlier dismissal of the case, the court left open the possibility that Almodovar and Bullard could challenge the statutes in federal court should the Supreme Court uphold the conviction.

"I think it's very good for us," the plaintiffs' attorney, Stanley Fleishman, said of the ruling.

'Something to Our Argument'

"We were claiming that the use of the pandering and prostitution laws was improper, and while the 9th Circuit obviously didn't attempt to answer the question, they certainly suggested that there's something to our argument, and that the statutes may have been used in an over-broad fashion," Fleishman said.

Deputy City Atty. Jack L. Brown, representing the Los Angeles Police Department, who with the district attorney's office was a defendant in the suit, said city and county officials have argued that use of the pandering and prostitution statutes does not violate film makers' First Amendment rights.

"The First Amendment can't operate to shield acts which otherwise are criminal, just because you're filming something," Brown said.

APPENDIX J

COPY OF DEFENSE ATTORNEY'S " MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS" 5 SEPARATE GROSS MISDEMEANOR COUNTS WHICH ALLEGED VIOLATIONS OF THE MINNESOTA BESTIALITY STATUTE, INCIDENT TO THE PRODUCTION OF A VIDEO TAPE INVOLVING SEXUAL INTERCOURSE WITH A ROTWEILLER DOG.

(Reference: Motion For Leave To Intervene and Petition for Writ of Certiorari, at page 40).

STATE OF MINNESOTA — FOURTH JUDICIAL DISTRICT COURT

COUNTY OF HENNEPIN — DIVISION FOUR -- EDINA

State of Minnesota,

Plaintiff,

vs.

Robert Walter Bonynge,

Defendant.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION

File No.

ARGUMENT

I. MINNESOTA STATUTES SECTION 609.294, TO THE EXTENT THAT IT AGGRAVATES CRIMINAL PENALTIES FOR ENGAGING IN ACTIVITY ENTITLED TO FIRST AMENDMENT PROTECTION, IS FACIALLY UNCONSTITUTIONAL AND UNCONSTITUTIONAL AS APPLIED, IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 3 OF THE MINNESOTA CONSTITUTION.

As already noted, supra, Minnesota Statutes Section 609.294 makes bestiality, to-wit: carnally knowing an animal, a misdemeanor offense. However, if the same

act is committed in the presence of another person, the act becomes a gross misdemeanor. In the instant case, Defendant's gross misdemeanor charges, especially in Counts 2 through 5, arise because the Defendant engaged in the process of hiring other persons to engage in bestiality, for the purpose of reproducing that act on video tape as a motion picture film. Thus, Defendant's act of recruiting and filming sexual activity results in aggravated criminal penalties, despite the fact that Defendant's action was done for the purpose of production of a motion picture film, presumtively entitled to the protection of the First Amendment, unless and until it is established that the film is obscene.[1] See Joseph Burstyn, Inc. v. Wilson, 343 U.S.

[1] In the instant case, Defendant is not charged with obscenity, and the complaint makes no allegation that the film in question violates any state obscenity laws.

495 (1952); Freedman v. Maryland, 380 U.S. 51 (1965); and Alexander v. City of St. Paul, 303 Minn. 201, 227 N.W. 2d 370 (1975). Such aggravation plainly violates the First Amendment.

Directly on point in this regard is the recent decision of the California Supreme Court in People v. Freeman, _____ Cal. 3d _____, _____ Cal.Rptr. _____, _____ P.2d _____ (August 25, 1988), in which the California Supreme Court held unconstitutional criminal prosecution of Defendants for violating the state statute on pandering prostitution, when the alleged prostitution amounted to payment to actors and actresses in sexually explicity motion picture films, involving the performance of live sex acts on screen. A copy of the slip opinion of the California Supreme Court is attached hereto as Exhibit A and incorporated by reference as if fully

set forth herein.

In reversing criminal convictions for pandering prostitution, based upon hiring actors and actresses to perform in sexually explicit films, the Supreme Court of California held that "the application of the pandering statute to the hiring of actors to perform in the production of a non-obscene motion picture would impinge unconstitutionally upon First Amendment values." Id., Slip Op. p. 7. In so concluding, the court stated:

> "Since the acts involved here have not been judged obscene, they are within the protection of the First Amendment. To subject the producer and director of a non-obscene motion picture depicting sexual conduct to prosecution and punishment for pandering, including the special provision for ineligibility for probation attendant on such a conviction (citation omitted), would rather obviously place a substantial burden on the exercise of First Amendment rights. To include the hiring and paying of actors for acting in such a film within the

> definition of pandering would therefore unconstitutionally infringe in First Amendment liberties...We observe that if Section 266i were applied in the manner urged by the People, it would include within the literal sweep of the statutory language films of unquestioned and artistic social merit, as well as films made for medical or educational purposes." Id. at pp. 9-10.

To be sure, the California Supreme Court reaffirmed an earlier holding that merely because a criminal act takes place during the filming of a motion picture does not absolve the actors of liability for otherwise criminal conduct. However, in the context of the instant case, the following language of the court's opinion is instructive:

> "Undeniably, one cannot lawfully hire another to commit murder, rape or robbery for the purpose of photographing the act. Murder, rape and robbery and aiding and abetting intercourse for that matter, are crimes independent of and totally apart from any payment for the right to photograph the conduct.
>
> By contrast the acts of alleged 'prostitution' in this case were

> not crimes independent of and apart from payment for the right to photograph the performance. The determination that pandering and prostitution occurred here was entirely dependent on the payment for the right to photograph. Indeed, under the People's theory the payment was used to establish not only the 'hiring' but also the elements of both the 'pandering' (procuring) and the 'prostitution' (i.e., lewd acts 'for money'). When considered aside from the payment of the acting fees, itself fully lawful otherwise, the sexual acts depicted in the motion picture here were completely lawful." Id. at 15.

In the instant case, it is clear that the act of carnally knowing an animal is itself unlawful, so that criminal liability might be imposed, even though Defendant hired the individual, for the purpose of filming it. However, it is absolutely clear that the aggravation of the criminal act for the simple misdemeanor to a gross misdemeanor is absolutely contingent upon Defendant's conduct in filming the act. Defendant becomes the "other person" for the purpose

of aggravating the act to a gross misdemeanor. Thus, although simple misdemeanor criminal liability might lie, regardless of whether or not an act was filmed or photographed for First Amendment purposes, the aggravation to the act to gross misdemeanor purposes is directly tied to the exercise of First Amendment rights of filming. As a result, although misdemeanor criminal liability might be imposed in such conduct, the aggravation to gross misdemeanor conduct is every bit as violative of First Amendment rights as was the pandering of prostitution charges in Freeman.

APPENDIX K

COPY OF STATUTES AND RULES OF COURT INVOLVED IN THE MOTION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI.

(Reference: Motion For Leave To Intervene, and Petition For Writ of Certiorari, at page 7-8).

JURISDICTION ON WRIT OF CERTIORARI

Rule 17

Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Rule 20

Review on Certiorari—Time for Petitioning

.1. A petition for writ of certiorari to review the judgment in a criminal case of a state court of last resort or of a federal court of appeals or a decision of the United States Court of Military Appeals (see 28 U. S. C. Sec. 1259) rendered after June 1, 1984, shall be deemed in time when it is filed with the Clerk within 60 days after the entry of such judgment. A Justice of this Court, for good cause shown, may extend the time for

applying for a writ of certiorari in such cases for a period not exceeding 30 days. [Rule 20.1 as amended 7/5/84, effective 8/1/84.]

.4. The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon a petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

§ 266i. [Pandering]

Any person who: (a) procures another person for the purpose of prostitution; or (b) by promises, threats, violence, or by any device or scheme, causes, induces, persuades or encourages another person to become a prostitute; or (c) procures for another person a place as inmate in a house of prostitution or as an inmate of any place in which prostitution is encouraged or allowed within this state; or (d) by promises, threats, violence or by any device or scheme, causes, induces, persuades or encourages an inmate of a house of prostitution, or any other place in which prostitution is encouraged or allowed, to remain therein as an inmate; or (e) by fraud or artifice, or by duress of person or goods, or by abuse of any position of confidence or authority, procures another person for the purpose of prostitution, or to enter any place in which prostitution is encouraged or allowed within this state, or to come into this state or leave this state for the purpose of prostitution; or (f) receives or gives, or agrees to receive or give, any money or thing of value for procuring, or attempting to procure, another person for the purpose of prostitution, or to come into this state or leave this state for the purpose of prostitution, is guilty of pandering, a felony, and is punishable by imprisonment in the state prison for three, four, or six years, or, where the other person is under 16 years of age, is punishable by imprisonment in the state prison for three, six, or eight years.

Rule 24. Decision of reviewing court

(a) [When decisions become final] All decisions of the reviewing courts shall be filed with the clerk, who shall forthwith transmit a copy of the opinion to the lower court or tribunal and to the parties. A decision of the Supreme Court becomes final 30 days after filing unless the court orders a shorter time or, prior to the expiration of the 30 day period or any extension thereof, orders one or more additional periods of time not to exceed a total of 60 additional days. A decision of a Court of Appeal becomes final as to that court 30 days after filing, except that the decision becomes final as to that court immediately after filing upon the denial of a petition for a writ within its original jurisdiction or a writ of supersedeas, without issuance of an alternative writ or order to show cause, or the denial of an application for bail or to reduce bail pending appeal, or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. When a

decision of a Court of Appeal is final as to said court, it is not thereafter subject to modification or rehearing by said court. Where an opinion is modified without change in the judgment, during the time allowed for rehearing, such modification shall not postpone the time that the decision becomes final as above provided; but if the judgment is modified during that time, the period specified herein begins to run anew, as of the date of modification.

Rule 25. Remittitur

(a) [Issuance and transmission] A remittitur shall issue after the final determination of any appeal, or of any original proceeding in review in which an alternative writ or order to show cause has been issued. Unless otherwise ordered, the clerk of the Supreme Court shall issue the remittitur when a judgment of that court becomes final, and the clerk of a Court of Appeal shall issue the remittitur upon the expiration of the period during which a hearing in the Supreme Court may be determined, including any extension of such period granted in the particular cause. The remittitur shall be deemed issued on the clerk's entry thereof in the register, and shall be transmitted immediately, with a certified copy of the opinion, to the lower court or tribunal. Whenever the judgment of the reviewing court changes the length of a sentence to state prison or changes the credits applicable thereto, or changes the maximum permissible period of confinement of a person committed to the custody of the Youth Authority, without requiring further hearing in the trial court, the clerk of the reviewing court shall also transmit a copy of the remittitur and the opinion to the Department of Corrections or to the Youth Authority.

Rule 27. Rehearing in court rendering decision

(a) [Power to grant rehearing] The Supreme Court or a Court of Appeal may grant a rehearing after its own decision in any cause except the denial by a Court of Appeal of a petition for a writ within its original jurisdiction without issuance of an alternative writ or order to show cause or the denial of a transfer to a Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court. A rehearing may be granted on petition, as provided in subdivision (b) of this rule, or on the court's own motion, prior to but not after the time the decision becomes final therein.

(b) [Time for filing petition] A party seeking a rehearing either in the Court of Appeal or in the Supreme Court must serve and file a petition therefor within 15 days after the filing of the decision.